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I hereby declare that I have read and understood the regulations governing submission of Master of Laws (Commercial law) – LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature.....

Date.....

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## INTRODUCTION

The Securities Regulation Panel ('the Panel') is a regulatory body established in terms of s 440B of the Companies Act 61 of 1973 ('the Act'). It was formed pursuant to a report made to the Standing Advisory Committee on Company Law by Judge Cecil Margo and Professor Stefan Naude (the 'Margo report') in 1983.<sup>1</sup> The Margo report recommended the creation of the South African Securities Regulation Panel to carry out functions similar to those of the City Panel on Takeovers and Mergers in London [the 'London Panel'] and the similar functions of the Securities and Exchange Commission of the United States of America.<sup>2</sup>

Judge Margo and Professor Naude's recommendations were born out of the need to address the problem of unfair treatment of shareholders of an offeree company in a take-over or merger situation.<sup>3</sup> Consequently, the stated purpose of the Panel is to ensure good business standards and fairness to shareholders thus contributing to the maintenance of fair and orderly markets.<sup>4</sup> According to s 440C (1) of the Act, one of the Panel's chief functions is to regulate, in such manner as it may deem necessary or appropriate, all transactions and schemes including proposals which on successful completion will result in affected transactions. The definition of 'affected transaction' in s 440A (1) of the Act includes schemes or transactions that result in the control of a company changing hands as well as a disposal of the whole or substantially the whole of the undertaking of a company or a disposal of the whole or the greater part of its assets in terms of s 228 of the Act.<sup>5</sup> In addition to regulating affected transactions, the Panel also supervises dealings in securities as provided for in s 440C (1) (b).

The Panel is also empowered by s 440C (3) to make rules in respect of the matters falling within the provisions of Chapter XVA of the Act. Pursuant to this power,

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<sup>1</sup> 'The securities regulation code: its background, implementation and the role as pertaining to take-overs and mergers.' Available at <http://www.srpanel.co.za/Background.pdf> [Accessed 9 August 2007]

<sup>2</sup> *supra*

<sup>3</sup> C Margo and S Naude 'Take-overs and mergers: the City Panel and the position in South Africa' (1983) *Report to the Standing Advisory Committee on Company Law* at 14.

<sup>4</sup> Securities Regulation Panel. Available at <http://www.srpanel.co.za/> [Accessed 9 August 2007]

<sup>5</sup> Note that section 228 of the Act was amended by the Corporate Laws Amendment Act 24 of 2006 which was published in Government Gazette No. 30594 published on 14 December 2007.

the Panel created the Securities Regulation Code on Takeovers and Mergers ('the Code') which became operative with effect from 1 February 1991.<sup>6</sup> Section 440L of the Act provides that subject to any exemption by the Panel, no person shall enter into or propose an affected transaction, except in accordance with the rules [as laid out in the Code]. Thus the Code has the force of law.<sup>7</sup> The Code lays down the general principles and the rules relating to certain aspects of affected transactions such as the duties of the offeror and the offeree company in a takeover situation. More importantly, for purposes of this thesis, the Code also contains rules providing for the administration and financing of the Panel as well as rules for the effective monitoring of compliance with and enforcement of the rules.<sup>8</sup>

The objective of this thesis is to identify factors that affect the Panel's ability to effectively monitor compliance with and enforce the Code. To this end, a critical analysis of the Panel's ability to monitor compliance with and enforce the Code will be undertaken in the thesis. Submissions will be made that several factors such as inadequate funding, the non-binding status of the Panel's rulings, lack of power to penalize non-compliant parties, the enforcement procedures laid down by the Act as well as the application of the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and the Promotion of Administrative Justice Act 3 of 2000 all hamper the Panel in the execution of its duties and thus impact negatively on its ability to effectively monitor compliance with and enforce the Code.

In pursuing the stated objective, a comparative analysis of the enforcement powers and procedures of regulatory bodies similar to the Panel in other jurisdictions will be undertaken. In particular, the Panel will be compared with the London Panel which enforces the City Code on Takeovers and Mergers ('the City Code') in the UK and the Takeovers Panel which enforces the Takeovers Code in New Zealand. A comparison between the Panel and the London Panel was considered appropriate given that the Code is to a large extent based on the City Code issued by the London Panel.<sup>9</sup>

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<sup>6</sup> 'The Securities Regulation Code: its background, implementation and the role as pertaining to take-overs and mergers.' (note 1)

<sup>7</sup> Explanatory 1(c) of The Securities Regulation Code on Take-Overs and Mergers

<sup>8</sup> Section 440C (4) (a) & (e) of the Companies Act No. 61 of 1973

<sup>9</sup> Explanatory Note 1(c) of The Securities Regulation Code on Take-Overs and Mergers

On the other hand, a comparison with the Takeovers Panel in New Zealand was considered proper given that the Takeovers Panel is a statutory body just like its South African counterpart;<sup>10</sup> the New Zealand Takeovers Code that it enforces also has statutory force just like the South African Code.<sup>11</sup> In addition, both the London Panel and the New Zealand Takeovers Panel operate in legal systems based on the common law just like the South African Panel. The object of the comparisons is to identify areas where the Panel's effectiveness can be improved by learning from the experiences of similar regulatory bodies in these other jurisdictions.

Following from the above, recommendations will be made on how the Panel's ability to monitor compliance with and enforce the Code can be enhanced. The recommendations will take into account the changes contemplated by the South African Companies Bill 2007 which seeks to reconstitute the Panel as the Takeover Regulation Panel as part of a far reaching amendment of the Companies Act.<sup>12</sup>

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<sup>10</sup> Section 5 of New Zealand Takeovers Act 1993

<sup>11</sup> Section 28 (4) of New Zealand Takeovers Act 1993

<sup>12</sup> Explanatory memorandum to the Companies Bill, 2007

## CHAPTER 1

### 1.1 FINANCING OF THE PANEL

In their report to the Standing Advisory Committee on Company Law recommending the establishment of the Panel, Judge Margo and Professor Naude did not consider it necessary to discuss the administrative and financial details of the Panel's organization because they did not foresee any insurmountable problems.<sup>13</sup> With the benefit of hindsight, one could say that perhaps they ought to have discussed the issue; for the Panel established consequent to their recommendation has faced and continues to face serious financial problems which threaten its continued financial viability as well as its ability to monitor compliance with and enforce the Code. This chapter examines the funding of the Panel, the financial problems which it faces and how these could be addressed based on a comparative analysis of the funding structures of the London Panel as well the New Zealand Takeovers Panel.

#### 1.2 Funding of the Panel

Funding for the Panel is provided for in Rules 2.1 and 2.2 of the Administrative rules in the Code which are to be read with s 440C (4) (a) and s 440E of the Companies Act. Section 440C (4) (a) provides that the rules [as laid out in the Code] shall make provision for the administration and financing of the Panel. Section 440E further provides that all the fees payable under the rules contemplated in s 440 (4)(a) shall be paid to the Panel and shall constitute its funds, and that the Panel shall utilize its funds for defraying expenses incurred in connection with the performance of its functions.

According to rule 2.1 of the Administrative rules in the Code, the Panel's funding will be partially met from a fee based on a percentage of the annual listing fees and initial listing fees charged by the Stock Exchange to companies listed on that exchange. The Stock Exchange in this case is the JSE Limited [the 'JSE']. Rule 2.2 of the Administrative rules provides for another source of funding namely, a fee charged in

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<sup>13</sup> C Margo and S Naude 'Take-overs and mergers: the City Panel and the position in South Africa' (1983) *Report to the Standing Advisory Committee on Company Law* at 35.



respect of the various services provided by the Panel. In terms of the Schedule of Fees and Charges which forms part of the Administrative rules, these services include, among others, consultations, interviews, advice and examination of documents. The Panel thus has two basic sources of funding; the levy based on a percentage of the annual listing fee or the initial listing fee charged by The Stock Exchange as provided for in rule 2.1 and the fee for services provided for in rule 2.2 of the Administrative rules.

It would appear that, as a source of income, the levy based on a percentage of the annual listing fees and initial listing fees charged by the JSE to companies listed on that exchange has a weakness in that it results in reduced revenues for the Panel when companies delist from the Stock Exchange and when there are few or no initial public offerings on the Stock Exchange. For example, in the Panel's annual financial statement for the year ended 28 February 2003 the Executive Director of the Panel noted that, 'A result of the shrinking number of companies maintaining their listing on the JSE ... was that income received by way of the 4% levy charged on companies' annual listing fees fell by 18% from R1 317 347 in the previous financial year to R1 076 322.'<sup>14</sup> In order to compensate for the falling revenue received from this levy, the Panel has had to increase the rate of the levy.<sup>15</sup> The result of the increase in the levy as the Panel tries to break even is that the reduced number of companies remaining on the Stock Exchange is made to bear an increased burden to support the Panel.

The funding available to the Panel under the existing funding structure is inadequate to meet the Panel's operating needs; in 2004 the Panel incurred a budget deficit of R1, 53 million due to 'falling revenues and hefty legal and enforcement costs.'<sup>16</sup> Another deficit of R1, 17 million in 2005 prompted the Panel's Chairperson to say that, 'That is clearly an unsatisfactory position in which the Panel finds itself bearing in mind its importance to the South African economy and its financial markets. It also underlines the necessity for three things:—

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<sup>14</sup> 2003 Securities Regulation Panel Annual Financial Statements at 7. Available at <http://www.srpanel.co.za/AFS%202003.pdf> [Accessed 13 August 2007].

<sup>15</sup> 2005 Securities Regulation Panel Annual Financial Statements at 9. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007].

<sup>16</sup> 2004 Securities Regulation Panel Annual Financial Statements at 6 Available at <http://www.srpanel.co.za/AFS%20SRP%202004.PDF> [Accessed 13 August 2007].

i) the need for the Panel to be properly and adequately financed having regard *inter alia* to a statement made by one disputant that its pockets were far deeper than those of the Panel;....<sup>17</sup> It is clear from this that the Panel's ability to enforce the Code against well funded corporations is undermined by inadequate funding.

While acknowledging that, despite inadequate funding, the Panel has managed to enforce the Code over the years as observed by Renee Bornochis who says that, 'In the absence of the necessary financial resources to match the enormously well-resourced vested interests that approach it on a daily basis, the SRP [Panel] has tended to resort to a variety of tactics, including informal discussions, persuasion and ex parte rulings. This is what has helped to keep the SRP [Panel]'s regulatory process ticking over,'<sup>18</sup> it is submitted that inadequate funding threatens the Panel's continued financial viability and hence its ability to enforce the Code. Therefore, it is necessary to find ways of ensuring adequate financing for the Panel. With this objective in mind a comparative analysis of the funding structure of the London Panel and the New Zealand Takeovers Panel is undertaken below.

### 1.3 Funding of the London Panel

Since its establishment in 1968 the London Panel as well as the City Code which it administers had no statutory backing.<sup>19</sup> However, following the implementation of the European Union Directive on Takeover Bids in the United Kingdom in 2006, the London Panel was designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers and at the same time the City Code was accorded statutory force.<sup>20</sup> The London Panel's statutory functions are provided for in Chapter 1 of Part 28 of the United Kingdom's Companies Act 2006.<sup>21</sup> It should be noted that this

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<sup>17</sup> 2005 Securities Regulation Panel Annual Financial Statements at 6. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007].

<sup>18</sup> Bornochis R 'SRP gives minority money's worth despite lame budget' in *Business Report*, 27 May 2005. Available at <http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=2535857> [Accessed 14 August 2007].

<sup>19</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin* [1987] 1QB 815 at 824.

<sup>20</sup> Section 1 and 2(a) of the City Code on Takeovers and Mergers. Available at <http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf> [Accessed 11 August 2007].

<sup>21</sup> Part 28 of the Companies Act 2006 came into force on 6 April 2007 as per The Companies Act 2006 (Commencement No.2 Consequential Amendments, Transitional Provisions and Savings) Order 2007

Act does not confer the status of a statutory body to the London Panel which remains an unincorporated body, as constituted from time to time, and, as such, has rights and obligations under the common law.<sup>22</sup> Funding for the London Panel is provided for in sections 957 to 959 of the Companies Act 2006. The London Panel derives its funding from three sources of income namely: document charges, PTM levy and exempt charges.<sup>23</sup>

The funding from document charges is provided for in s 957 of the UK Companies Act 2006 as read with s 13 of the City Code. Document charges are payable on offer documents for all offers valued at £ 1 million or more; and the charge depends on the value of the offer according to the scale of document charges set out in the City Code.<sup>24</sup> Document charges are similar to the fees levied by the South African Panel for examining documents submitted to it for approval in terms of Rule 2.2 of the Administrative rules in the Code as read with the Schedule of Fees and Charges. Thus on this count the Panel's funding structure is similar to that of the London Panel.

The PTM (Panel on Takeovers and Mergers) levy is provided for in s 958 of the UK Companies Act 2006. Section 958(1) provides that '[f]or the purpose of meeting any part of the expenses of the [London] Panel, the Secretary of State may by regulations provide for a levy payable to the Panel-

- (a) by specified persons or bodies, or persons or bodies of a specified description, or
- (b) on transactions, of a specified description, in securities on specified markets...'

On the face of it, the PTM levy appears to be similar to the levy charged by the South African Panel based on a percentage of the annual listing fee or the initial listing fee charged by The Stock Exchange as provided for in Rule 2.1 of the Administrative rules. However, the two levies are different. The difference is fundamental in so far as the two levies' revenue potential is concerned. As a source of revenue, the PTM levy has a much wider scope of application and hence a potentially larger revenue generation capability

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published in SI 2007/1093 Available at [http://www.opsi.gov.uk/si/si2007/uksi\\_20071093\\_en.pdf](http://www.opsi.gov.uk/si/si2007/uksi_20071093_en.pdf) [Accessed 11 August 2007].

<sup>22</sup> Explanatory note 1181 of United Kingdom Companies Act 2006. Available at <http://www.opsi.gov.uk/acts/en2006/06en46-v.htm> [Accessed 11 August 2007].

<sup>23</sup> Fees and Charges Available at <http://www.thetakeoverpanel.org.uk/new/> [Accessed 11 August 2007].

<sup>24</sup> Supra.

than the South African levy which is payable by companies listed or listing on the Stock Exchange only. According to s 958(1) of the UK Companies Act 2006 the PTM levy is payable by specified persons or bodies; and it can also be levied on specified transactions in securities on specified markets. Currently, the PTM levy is applied to all UK securities transactions, except gilts, where the value of the deal exceeds £10,000 or EUR 15,000.<sup>25</sup> It is thus a charge imposed on investors when they buy or sell shares the value of which exceeds £10,000.<sup>26</sup> It is levied on transactions carried out on three securities markets: the London Stock Exchange, virt-x and Ofex.<sup>27</sup>

Section 958(2) of the Companies Act 2006 further provides that the power to specify (or specify descriptions of) persons or bodies must be exercised in such a way that the [PTM] levy is payable only by persons or bodies that appear to the Secretary of State to be capable of being directly affected by the exercise of any of the functions of the Panel or otherwise to have a substantial interest in the exercise of any of those functions.’ It will be seen from this that PTM levy goes beyond the London Stock Exchange to cover unlisted entities and persons who are capable of being directly affected by the London Panel’s exercise of its functions or have a substantial interest in the exercise of those functions. Given its wider scope of application, the frequency and the volumes at which shares are bought and sold on the specified securities markets, the PTM levy has the potential to raise more revenue than a levy based on the percentage of fees charged to companies listed or listing on the Stock Exchange.

The exempt charges are provided for in Section 13 of the City Code. They are levied on entities such as fund managers and principal traders who are granted exemption from the application of certain provisions of the City Code such as, for example, a fund manager may be exempted from the application of the principle of acting in concert.<sup>28</sup> The granting and continued regulation of exempt status is provided at a cost to the Panel and groups which benefit from exempt status are required to pay a

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<sup>25</sup> ‘What is PTM levy?’ Available at [http://www.firstdirect.com/shared dealing/rates\\_fees.shtml](http://www.firstdirect.com/shared dealing/rates_fees.shtml) [Accessed 11 August 2007].

<sup>26</sup> PTM levy definition Available at <http://www.finance-glossary.com/terms/PTM-levy.htm?id=2008&ginPtrCode=00000&PopupMode=> [Accessed 11 August 2007].

<sup>27</sup> Fees and Charges Available at <http://www.thetakeoverpanel.org.uk/new/> [Accessed 11 August 2007].

<sup>28</sup> See note 5 under Notes on Exempt Fund Manager and Exempt Principal Trader in the Definition Section of The City code on takeovers and mergers.

charge of £5,000 per exempt entity at the time of review.<sup>29</sup> There appears to be no equivalent of the exempt charges in the funding structure of the South African Panel. Although s 440L of the South African Companies Act makes reference to an exemption being granted by the South African Panel, it would appear that such an exemption applies to a specific transaction and not to an entity. Indeed section A3 of the South African Code which deals with the companies to which the Code applies says that, ‘...provided that the Executive Director may *exempt any particular transaction* (*emphasis added*) affecting a private company if satisfied that there can be no prejudice to minority shareholders.’ It is submitted that introducing the concept of exempt status fees in the funding structure of the South African Panel would give the Panel an extra source of revenue and hence help to ease its financial problems. In addition, the concept of exempt status could, in certain cases, result in cost savings by obviating the need to investigate what investment mandates asset/fund managers hold in any given case in order to determine whether or not they acted in concert as was the case in the *Comparex Holdings* case.<sup>30</sup> In that case the Panel had to determine whether asset managers who had acquired 35 per cent of shares in a company on behalf of their clients had acted in concert in so acquiring the shares.

From the foregoing comparative analysis of the funding structure of the London Panel, one could say that the PTM levy and the exempt fees are sources of income that the Panel in South Africa would do well to incorporate in its funding structure so as to boost its finances and enhance its efficacy in enforcing the Code.

#### **1.4 Funding of the New Zealand Takeovers Panel**

The New Zealand Panel, like the South African Panel, is a statutory body.<sup>31</sup> Its funding is provided for in sections 17 and 17A as read with s 46 of the New Zealand Takeovers Act 1993 [the ‘Takeovers Act’]. One source of funding for the Takeovers Panel is the annual fee levied on companies in terms s17(1) of the Takeovers Act which provides that, ‘each specified company shall pay such annual fee in respect of the funding of the

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<sup>29</sup> Fees and Charges Available at <http://www.thetakeoverpanel.org.uk/new/> [Accessed 13 August 2007].

<sup>30</sup> Securities Regulation Panel Ruling in the case of *Comparex Holdings Limited* Available at <http://www.srpanel.co.za/Publications.htm> [Accessed on 13 August 2007].

<sup>31</sup> Section 5 of New Zealand Takeovers Act No. 107 of 1993.

[Takeovers] Panel as may be prescribed by regulations made under this Act.’ This fee is similar to the South African Panel’s levy based on a percentage of the annual listing or initial listing fee charged to listed companies by the JSE; the similarity being that the two fees are charged on companies on an annual basis.

Section 46 of the Takeovers Act empowers the Governor General to make regulations for the purposes of, among other things, prescribing the fees and charges that the [Takeovers] Panel may require to be paid to it in connection with the exercise of any of its powers. In terms of the regulations made under this section, the Takeovers Panel charges fees for applications for exemption from compliance with requirements of the New Zealand Takeovers Code [the ‘Takeovers Code’], fees for various approvals such as an application for consent to withdraw an offer under rules of the Takeovers Code and fees for meetings held by the Panel in terms of the Takeovers Act.<sup>32</sup> With the exception of the fees charged for applications for exemptions from complying with the provisions of the Takeovers Code, it would appear that the fees charged by the Takeovers Panel are similar to those charged by the Panel in South Africa for the various services provided by it in terms of rule 2.2 of the Administrative rules as read with the Schedule of Fees and Charges.

In addition to the fees noted above, the Takeovers Panel is also funded by the appropriation of money by Parliament.<sup>33</sup> That is, the Takeovers Panel receives funding from the New Zealand government’s budget. The Takeovers Panel’s 2006 Statement of Financial Performance shows that such government funding equalled its baseline funding.<sup>34</sup> In other words, government funding met the Takeovers Panel’s minimum financial requirements. In this respect the funding structure of the Takeovers Panel differs from that of its South African counterpart. There is nothing in the latter’s financial statements, the Code or the Companies Act to suggest that it derives any of its funding from the South African government. Given that the South African Panel is struggling to build up its ‘war chest’ - financial reserve – to the desired level of R10

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<sup>32</sup> The Takeovers (Fees) Regulations 2001 Administrative Guidelines Available at <http://www.takeovers.govt.nz/act/fees.htm> [Accessed 13 August 2007].

<sup>33</sup> Sources of Funding in Takeovers Panel Annual Report 2006 Available at <http://www.takeovers.govt.nz/publications/ann-rep-06/02.htm> [Accessed 13 August 2007].

<sup>34</sup> Available at <http://www.takeovers.govt.nz/publications/ann-rep-06/03.htm#performance> [Accessed 13 August 2007].

million,<sup>35</sup> it is recommended that the Panel's funding structure be reviewed so as to provide for some government funding as is the case with the Takeovers Panel.

Based on this comparative analysis of the funding structures of the New Zealand Takeovers Panel and the London Panel perhaps the funding of the South African Panel could be enhanced by incorporating into its funding structure additional sources of revenue such as the PTM levy and the exempt status fees. Government funding as in the case of the New Zealand Takeovers Panel should also be considered. To avoid placing a heavy burden on the public budget, access to government funding could be limited once the Panel attains its desired financial reserves.

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<sup>35</sup> Securities Regulation Panel Annual Financial Statements 28 February 2006. Available at <http://www.srpanel.co.za/Annual%20Report%202006.pdf> [Accessed 13 August 2007].

## CHAPTER 2

### 2.1 THE ENFORCEMENT PROCEDURES

The preceding chapter discussed the funding structure of the Panel and how inadequate financing impinges on the Panel's ability to enforce the Code. In this chapter, the enforcement procedure and sanctions for non-compliance provided for under Chapter XVA of the Companies Act No. 61 of 1973 ['the Act'] as well as the Code will be examined. It will be shown that the investigative power bestowed upon the Panel by the Act is a crucial aspect of the enforcement process. Shortcomings of the enforcement procedure will also be highlighted. The nature and effect of the Panel's rulings as well as the Panel's reliance on the Courts to enforce its rulings will be considered. Also discussed in this chapter is the Panel's lack of power to impose fines and criminal sanctions on non-compliant parties and how the Companies Bill 2007 seeks to address this situation.

### 2.2 Investigative Powers

It is submitted that for the Panel to enforce the Code effectively, it must, in the first place, be able to monitor compliance with and identify breaches of the Code. For, if the Panel can not identify any breaches of the Code, there is nothing for it to enforce. It has been said that 'The benefits of a comprehensive Code are of limited use if there is an ineffective monitoring system to ensure the market's compliance and to detect any breaches of the Code.'<sup>36</sup> One of the Panel's functions as provided for in s 440C (4) (e) of the Act is to make rules providing for the effective monitoring of compliance with, and enforcement of the rules [as laid out in the Code]. However, it would appear that the Panel has not made any rules relating to its monitoring function per se as observed by Blackman *et al* who say that,

'as to 440C (4) (e), the Panel itself does not appear to have made any rules for effective monitoring of compliance with and its enforcement of the rules,

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<sup>36</sup> GK Morse 'The City code on takeovers and mergers – self regulation or self protection?' (1991) *JBL* 509 at 515



beyond, of course, its rules governing its hearings, appeals and accessibility (which can, no doubt, be understood as rules which enable the Panel to monitor its Code) and its rules relating to investigations under 440D.<sup>37</sup>

However, the absence of rules made by the Panel to govern the monitoring of compliance with the Code should not be fatal given that the Panel has authority under the Companies Act to undertake investigations for the purposes of carrying out its functions in terms of the Act.<sup>38</sup> Thus the Panel has statutory power to appoint investigators.<sup>39</sup> Its investigative powers include the power to demand production of documents, compel attendance of witnesses<sup>40</sup> as well as the power to examine witnesses under oath.<sup>41</sup> These investigative powers may be exercised by the Panel *mero motu*.<sup>42</sup>

It is also conceivable that the Panel might institute an investigation upon complaint or enquiry by a party. Usually, and especially in hostile takeover situations, well resourced companies carry out their own investigations on the counterparty and provide information of any wrong doing to the Panel thereby saving the Panel the cost of undertaking an extensive investigation. The Code provides that when there is doubt as to whether a proposed course of conduct is in accordance with the General Principles or the Rules, parties or their advisers may consult the Executive Director in advance.<sup>43</sup> The Act reinforces the Panel's investigative powers by providing that any person summoned to attend before or to produce any document to the Panel is guilty of an offence if he fails to do so.<sup>44</sup> It is submitted that though the Panel did not make any rules specifically providing for its monitoring function, the statutory investigative powers given to the Panel by the Act sufficiently equip it for its monitoring role and thus place it in a good position to enforce the Code.

To the extent that the Panel has statutory authority to investigate matters pertaining to compliance with the Code, it differs from and, one could say, fares much

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<sup>37</sup> Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-44

<sup>38</sup> Section 440D of the Act

<sup>39</sup> Section 440B (13) as read with Section 440D (1) of the Act.

<sup>40</sup> Section 440D (1) (a) of the Act.

<sup>41</sup> Section 440D (1) (b) of the Act.

<sup>42</sup> Explanatory Note 1(c) of the Code

<sup>43</sup> Section A: Introduction of the Code 2(c)

<sup>44</sup> Section 440D (3) of the Act.

better in monitoring compliance with the Code than the then London Panel which administered the City Code. For, until last year when the UK Companies Act 2006 was passed, the London Panel had no statutory authority and so had no legal powers to demand the production of documents, to compel the attendance of witnesses or examine them on oath nor did it have powers to appoint investigators.<sup>45</sup> While in this respect the Panel appears to have fared better than its UK counterpart at some point, the important question is: What can the Panel do when its investigations reveal a breach of the Code? Investigating and identifying instances of non-compliance is but a preliminary step in the enforcement process; what happens thereafter is equally crucial in enforcing the Code and it is in this area that the Panel is found wanting in some aspects discussed below.

### **2.3 Panel's power to make rulings and decisions**

In practice what has tended to happen is that parties approach the Panel's Executive Director or the Panel's Executive Committee and, failing decision by these two, the Panel for rulings on the application or interpretation of the Code using the procedure outlined in the Code.<sup>46</sup> The existence of this procedure in the Code presupposes that the Panel has the power to make such rulings and decisions on the provisions of the Code. However, it would appear that the Act does not expressly confer such powers on the Panel:

'...although the Panel has assumed that it has the power to make decisions and rulings on the provisions of the Code, and to delegate these functions to its Executive Committee..., neither s 440C nor any of the other sections in Chapter XVA expressly confer this power on the Panel.'<sup>47</sup>

In other words, there is no express statutory basis for the decision-making power that the Panel has given to itself in the Code. On the other hand, one academic observed that

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<sup>45</sup> GK Morse 'The City code on takeovers and mergers – self regulation or self protection?' (1991) *JBL* 509 at 515. Section 946 of the UK Companies Act 2006 now empowers the London Panel to require production of documents and information.

<sup>46</sup> Section A: Introduction of the Code 2(c). See also Rulings of the Securities Regulation Panel available at <http://www.srpanel.co.za/Publications.htm> [Accessed 27 August 2007]

<sup>47</sup> Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-45

s440C (4) (d) of the Act specifically authorises the Panel to make rules relating to the appeals from the decisions of the executive director right through to the Panel and, she argues that this would seem to assume that someone has the authority to make rulings and decisions which can be appealed.<sup>48</sup> Although there is merit in this observation, the fact remains that the Panel's power in this regard is open to question as evidenced by the comments of Blackman et al cited above. It is submitted that the effectiveness of any regulatory agency depends on, among other things, clarity as to its role and decision making powers. Without clarity concerning its decision making powers, a regulatory agency such as the Panel might find its authority to make rulings relating to the application, as well as interpretation of the Code, being questioned by those whom it seeks to regulate. Such a situation is undesirable because first, it may lead to the Panel getting involved in long-drawn and costly legal battles that it can ill-afford due to its weak financial position discussed in the previous chapter; secondly, the Panel may shy away from making certain rulings so as to avoid being challenged in court for lack of authority to make such rulings.

Other regulatory bodies similar to the Panel such as the London Panel and the New Zealand Takeovers Panel have their powers to make specific rulings clearly laid out by statute as more-fully discussed in chapters three and four. For instance, s945 (1) of the UK Companies Act 2006 provides that the [London] Panel may give rulings on the interpretation, application or effect of rules. On the other hand, s32 of the New Zealand Takeovers Act 1993 provides that the Takeovers panel has the power to make determinations about compliance with the takeovers code and to issue restraining orders relating to the non-compliance with the takeovers code. It is submitted that an express provision in the Companies Act, supplemented by the Code, spelling out clearly what kind of rulings and decisions the Panel is empowered to make could go a long way towards enhancing the Panel's ability to enforce the Code by dispelling doubts concerning its powers.

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<sup>48</sup> SM Luiz, 'Enforcement of the Securities Regulation Code and the Role of the Courts' (2006) 27 (1) *Obiter* pg 49 at 53

## 2.4 Status of Panel's Rulings

Apart from the uncertainty attaching to the Panel's power to make rulings and decisions on the application and interpretation of the Code, a related issue that also raises doubts about the Panel's ability to enforce the Code pertains to the status of the Panel's rulings. The provisions of Chapter XVA of the Act do not specify the status of rulings and decisions handed down by the Panel.<sup>49</sup>

The question here is whether the decisions of the Panel are legally binding on the concerned parties or not; It would appear that the Panel's rulings are not binding on the parties concerned as it has been said that,

‘As far as the Panel's rulings are concerned, the answer is, perhaps, that the Panel is not a court, and its rulings are not binding in the sense that they impose obligations or duties on the persons concerned. Rather, its rulings are no more than rulings as to whether, in the opinion of the Panel, the Code is or is not being, or has or has not been, complied with. If a person does not comply with these rulings, he does not thereby commit a breach of a duty or obligation.’<sup>50</sup>

If it is accepted, as it is herein, that the Panel's rulings are of a non-binding nature, one could then argue that the Panel is able to enforce the Code only to the extent that the parties concerned are willing to abide by its rulings and decisions – an untenable position for a regulatory body thus casting further doubt on the Panel's ability to enforce compliance with the Code. One might counter argue that the Panel is not without remedy in the event of non-compliance, for there are various sanctions that the Panel may apply to enforce the Code such as those provided for in s440M of the Act read with the Code. For instance, the Code provides that,

‘The Panel may enforce the Code by application to court for an order for specific performance and/or an interdict and/or a declaratory order and/or by notification to interested parties and/or by general publication of an announcement that the requirements of the Code have not been complied with....’<sup>51</sup>

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<sup>49</sup>Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-44

<sup>50</sup> *supra*

<sup>51</sup> Explanatory Note 1 (c) of the Code

While there are these various sanctions at the Panel's disposal, there are issues surrounding their nature and effectiveness as discussed below.

## 2.5 Enforcement by Notification

Although the Code makes reference to enforcing the code by way of notification to interested parties,<sup>52</sup> it would appear that the Act does not expressly provide for any such notification to interested parties. Of course if the Panel is to fulfil its statutory role as enforcer of the Code it would necessarily need to notify the parties concerned that they are in breach of the Code. However, this fact alone does not entail that a notice issued by the Panel to comply with the code becomes a statutory/compliance notice. There is a distinction between the notification contemplated by the Code and a statutory/compliance notice and the distinction is important because in general, failure to comply with a statutory notice is a criminal offence and, if a statutory/compliance notice is ignored or contravened, the defendant will generally be subject to a term of imprisonment or a fine specified in the statute concerned.<sup>53</sup> Sections 172 and 215(2) of the Companies Bill 2007 which are discussed below provide an example of a statutory/compliance notice and its effect.

It would appear that the notification contemplated by the Code is one meant to inform parties that they are in breach of the code as well as to persuade the parties to comply with the Code. Thus it is an informative and persuasive notice which does not amount to a statutory notice to comply with the Code. Statutory notices are issued pursuant to the provisions of a statute and they,

‘... require the recipient to do or refrain from a particular behaviour. They specify the steps a business must take in order to be compliant and the timescale for these changes. Depending on the statutory provision, a Statutory Notice may also include remediation provisions relating to the damage caused by the failure to comply with regulations.’<sup>54</sup>

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<sup>52</sup> Explanatory Note 1 (c) of the Code

<sup>53</sup> Better Regulation Executive *Regulatory justice: sanctioning in a post-Hampton World* (2005) Available at <http://www.ucl.ac.uk/laws/environment/docs/penalties.pdf> [Accessed 22 November 2007]

<sup>54</sup> Richard B. Macrory *Regulatory justice: making sanctions effective*. Final Report to the UK Cabinet Office (2006). Available at [http://bre.berr.gov.uk/regulation/documents/pdf/macrory\\_penalties.pdf](http://bre.berr.gov.uk/regulation/documents/pdf/macrory_penalties.pdf) [Accessed 22 November 2007]

The view that the notification issued by the Panel as contemplated under the Code is not a statutory notice is supported by the fact that section 440M provides that where a person who is not exempted from compliance with the rules acts in contravention of any rules, the Panel may apply for an interdict or an order for specific performance compelling such person to comply with the relevant rule. It is submitted that if the notification referred to in the Code was a statutory notice it would, in effect, interdict or compel the non-compliant party to refrain or to do certain things so as to comply with the rules and thus there would be no need for the Panel to apply to court in terms of section 440M for an order restraining or compelling a party to refrain from or to do certain things so as to comply with the Code. In other words, if the notice contemplated in the Code was a statutory notice, the provisions of section 440M would be superfluous.

It is submitted that since the notification contemplated by the Code is not a statutory notice it can hardly be regarded as a sanction in the Panel's enforcement toolkit. The notice is merely informative and persuasive. It should, at most, be considered as a preliminary step in the enforcement process. Its effectiveness in securing compliance with the Code depends entirely on the willingness of the parties concerned to abide by the Panel's ruling. If the parties do not comply after being notified, there are no consequences for them. Thus the notification procedure provided for under the Code is not effective as a sanction for enforcing the Code. Regulatory sanctions are supposed to achieve compliance by signalling the threat of a punishment for firms that have offended; they demonstrate that non-compliance will not be tolerated and that there will be a reprimand or consequence that will put the violator in a worse position than those entities that complied with their regulatory obligations on time.<sup>55</sup>

It is submitted that the Panel's effectiveness in enforcing the Code by way of notification to the interested parties could be enhanced by giving the Panel power to issue statutory notices that are backed by the threat of a fine or criminal sanctions. The Companies Bill 2007 appears to be heading in the right direction in this regard. Section

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<sup>55</sup> Richard B. Macrory *Regulatory justice: making sanctions effective*. Final Report to the UK Cabinet Office (2006). Available at [http://bre.berr.gov.uk/regulation/documents/pdf/macrory\\_penalties.pdf](http://bre.berr.gov.uk/regulation/documents/pdf/macrory_penalties.pdf) [Accessed 22 November 2007]

172 of the Bill provides that the Takeover Special Committee<sup>56</sup> may issue a compliance notice to any person whom the Takeovers Special Committee, on reasonable grounds believes has contravened the Act.<sup>57</sup> Such a compliance notice may require the person to whom it is addressed to cease, correct or reverse any action taken in contravention of the Act. In terms of section 215 (2) of the Bill it is an offence to fail to satisfy a compliance notice. If a person fails to comply with a compliance notice the Takeover Regulation Panel – which replaces the Panel in the Bill- may apply to court for the imposition of an administrative fine.

The approach taken in the Bill places the Panel in a better position to enforce the Code by way of a statutory (compliance) notice than the current notification procedure envisaged under the Code. As things stand currently, if parties fail to take heed of the Panel's notice, the Panel would have to take further enforcement steps as discussed below.

## **2.6 Enforcement by Publication of Announcement**

Another enforcement procedure the Panel could adopt is to enforce the Code by way of a general publication of an announcement that the requirements of the Code have not been complied with. As with a notification to interested parties, it could be argued as well that the effectiveness of publishing a general announcement as an enforcement procedure depends on the willingness of the parties to abide by the Panel's ruling. However, to be fair, this procedure is not entirely without merit; the threat of a general publication of an announcement that a party has not complied with the Code might constitute a sufficient motivating factor to comply for a party that is concerned about its public image. On the downside, one can envisage a non-compliant party reacting to a general publication of an announcement by taking a public relations offensive questioning the Panel's ruling and justifying the party's own position; or, the party could simply ignore the announcement altogether. A problem of this kind bedevilled the London Panel in its

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<sup>56</sup> The Takeovers Special Committee is established under s 203(1) of the Bill

<sup>57</sup> Although the section speaks of 'contravention of the Act' without reference to the Code, it would appear that contravention of the Takeover Regulations which will replace the Code would also amount to a contravention of the Act. In this regard see section 110(2) of the Bill.

early years as can be seen from Sir Leslie O'Brien's letter sent to the Chairman of the Issuing Houses Association on 15 August 1968 -reproduced by Johnston- where he said:

‘In a few instances, after due deliberation, the [London] Panel has felt obliged to state publicly that a breach of the [City] Code has in its opinion occurred...these rulings were in each case entirely justified and I do not see that the [London] Panel had any option but to make them public and to do so with the minimum delay. *The result, however, has been less than satisfactory. Much resentment has been aroused. The [London] Panel's rulings have been questioned and even their general authority has not always been acknowledged. It is in no one's interest that this state of affairs should continue.*’ (Own emphasis)<sup>58</sup>

In the light of the foregoing, enforcing the Code by means of a public announcement may not be the most effective method. This then leads us to one other enforcement option available to the Panel which, on the face of it, appears to be the most effective – enforcement by way of an application for a court order in terms of section 440M of the Act. This procedure is discussed below and, as will be shown, it is also not without its shortcomings.

## **2.7 Enforcement by way of Court Application**

The procedure for enforcing the Code by way of a court application for an order for specific performance, interdict or declaratory order is provided for in section 440M of the Act. Subsection (1) of that section reads,

‘If any person who is not exempted from compliance with the rules acts in contravention of any rules, the panel may apply to the Court for an order compelling such person to comply with the relevant rule, and the Court may in its discretion issue such an order.’

It is noteworthy that according section 440M (3) the Court will only grant an order contemplated in section 440M if it is ‘proved to the satisfaction of the Court’ that there is a reasonable likelihood that any rule of the Code has been or will be contravened. Commenting on the provisions of section 440M, Blackman et al say that, ‘At that stage, the court does not review the Panel's rulings. Rather it decides whether the conduct in

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<sup>58</sup> A Johnston *The city take-over code* 1ed (1980) 52. Sir Leslie O' Brien was then the Governor of the Bank of England and he was responsible for the proposal to set up the [London] Panel.



question would or has constituted a contravention.’<sup>59</sup> What this entails is that if the Panel makes a ruling and a party fails to comply with that ruling, the Panel will be forced to apply for a court order to enforce its ruling; in turn, the Court will not summarily enforce the Panel’s ruling. Rather, the court will carry out its own enquiry to satisfy itself that there has been or there is likelihood of a contravention of the Code.<sup>60</sup>

It is submitted that the enforcement procedure outlined above undermines the role of the Panel as the primary interpreter and enforcer of the Code and it places the Panel in a weak position;

‘If the parties involved do not respect the rulings of the Panel by abiding by them and the Panel is required to take court action to enforce the Code, the panel is effectively nothing more than a rule-making body ...If it considers that there has been non-compliance, it has no real power to do anything, except to issue a non-binding ruling requesting compliance.’<sup>61</sup>

Concern has also been raised that the procedure of enforcing the Code by way of a court application could result in the frustration of an offer and that this is contrary to the spirit of general principle 7 of the Code which prohibits the taking of action that could effectively result in any bona fide offer being frustrated.<sup>62</sup> The reasoning behind this concern is that, if the procedure envisaged by section 440M entails the rehearing of a matter by the Court, this could have the effect that the timetable for a takeover is exceeded; a consequence of which would be the lapsing of an offer in terms of rule 28.6 as read with rule 32.1 of the Code.<sup>63</sup> Rule 28.6 (a) of the Code provides that an offer lapses if it does not become or is declared unconditional as to acceptances within 60 days after the day the initial offer was posted. And, once an offer lapses in this manner Rule 32.1 provides that the offeror and any person acting in concert with the offeror in respect of the original offer are prohibited from making another offer for the relevant securities of the offeree company within twelve months of the lapsing of the original

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<sup>59</sup> Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-45

<sup>60</sup> SM Luiz, ‘Enforcement of the Securities Regulation Code and the Role of the Courts’ (2006) Vol 27 Issue 1 *Obiter* pg 49 at 54.

<sup>61</sup> *supra*

<sup>62</sup> SM Luiz at 55.

<sup>63</sup> *Supra*.

offer.<sup>64</sup> There is therefore a tension between the enforcement procedure and the spirit of the Code in that non-compliance with a Panel ruling by a party might force the Panel to apply to court for the enforcement of its ruling yet such legal action by the Panel could effectively result in an offer being frustrated contrary to the spirit of the Code.

It is arguable that the concern discussed above is very remote because it is unlikely that the Panel would allow its own enforcement action to cause an offer to lapse thereby frustrating the offer, for to allow such a situation would be a self defeating exercise by the Panel. The Panel could always exercise the discretion conferred upon it by rule 34 of the Code and grant an exemption from the requirement of rule 28.6 (a) that the offer become unconditional as to acceptances within 60 days. Rule 28.6 (a) itself provides,

*‘Except with the consent of the Panel (own emphasis), an offer...may not become or be declared unconditional as to acceptances after midnight on the 60<sup>th</sup> day after the initial offer document was posted....’*

Thus the Panel could consent to the extension of the 60 day limit to avert the frustration of an offer resulting from delays caused by the Panel making a court application to enforce its ruling.

However the argument faces the problem that the general discretion conferred upon the Panel by rule 34 to exempt parties from the requirements of the Code has some limitations. The rule is expressed in this manner,

*‘Without derogation from any specific provision of the Rules whereby the Panel may grant exemption or dispensation from any requirement or permission or consent to depart from any requirement, (own emphasis) the Panel shall enjoy a general discretion to authorize, subject to such terms and conditions as it may prescribe, non-compliance with or departure from any requirement of the Code and to excuse or exonerate any party from failure to comply with any such requirement.’*

Thus the general discretion to grant exemptions provided for in rule 34 is limited by, or it cannot detract from, the specific provisions of any rule in the Code in terms of which the Panel may grant exemption or dispensation from any requirement or permission or consent to depart from any requirement. Rule 28.6 (a) is such a rule. It provides,

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<sup>64</sup> Rule 32.1 of the Code

‘Except with the consent of the Panel an offer...may not become or be declared unconditional as to acceptances after midnight on the 60<sup>th</sup> day after the initial offer document was posted. The Panel’s consent will normally *only (Own emphasis)* be granted if a competing offer has been announced...; or if the board of the offeree company consents to an extension.’

Rule 28.6 (a) therefore identifies two sets of circumstances under which the Panel can consent to an extension of the 60 day limit for an offer to become or be declared unconditional as to acceptances. These are: where a competing offer has been announced or where the board of the offeree company consents to an extension. The inclusion of the word ‘normally’ in Rule 28.6(a) seems to suggest that there are other exceptional circumstances where the Panel may depart from the norm and grant an extension of the sixty day limit. Therefore it is arguable that the lapsing of an offer caused by the Panel bringing a court application in terms of s 440M of the Act constitutes an exceptional circumstance justifying a departure from the norm prescribed in rule 28.6 (a). In the case of *Gold Fields Ltd v Connellan NO and others* the court considered the interpretation of rule 28.6 (a). However, without expounding on the import of the word ‘normally’ in rule 28.6 (a), the court said that to grant an exemption from the requirements of rule 28.6 other than as provided in rule 28.6 (a) would be derogating from the specific provisions of rule 28.6 (a) and that this was impermissible in the very words of Rule 34.<sup>65</sup> In the light of the above it is debatable whether or not the Panel has power to extend the 60 day limit so as to prevent an offer from being frustrated as a result of the Panel having taken steps to enforce its ruling by way of a court application. Therefore the concern still remains that a refusal by a party to comply with a ruling of the Panel and the necessity of bringing a court application to have the rule enforced could result in the frustration of an offer.<sup>66</sup>

## 2.8 Penal Powers

It has already been noted, in discussing the status of the Panel’s ruling, that the Panel’s rulings are not binding in the sense that they impose obligations or duties on the persons concerned and that if a person does not comply with these rulings, he does not thereby

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<sup>65</sup> *Gold Fields Ltd v Connellan NO and Others* [2005] 3 All SA 142 at 176.

<sup>66</sup> SM Luiz at 55

commit a breach of a duty or obligation.<sup>67</sup> Following from this, the Panel does not have power to impose penalties on parties who fail to abide by its rulings – a fact lamented by the Chairman of the Panel when he expressed the need for the Panel to be granted the right to fine and procure criminal sanctions against any person breaching the Code.<sup>68</sup>

It is submitted that the Panel's lack of power to impose penalties on non-compliant parties limits its ability to enforce the Code. A fine or the risk of criminal sanctions would act as a deterrent factor for parties who are wont to ignore the Panel's rulings. As things stand now, the lack of consequences in the form of either criminal or financial penalties emboldens parties not to abide by the Panel's rulings in the full knowledge that nothing of consequence will befall them. The fact that the Panel lacks power to impose fines or procure criminal sanctions against non-compliant parties is all the more surprising given that another statutory body involved in the regulation of mergers and takeovers –the Competition Tribunal, has statutory power to impose an administrative penalty upon parties who fail to comply with the requirements of the Competition Act.<sup>69</sup> For instance, the Competition Tribunal can impose a penalty of up to 10% of a firm's annual turnover in the Republic or exports from the Republic for proceeding to implement a merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger.<sup>70</sup> Thus the penalties for breach of the provisions of the Competition Act are severe and serve as a deterrent for non-compliant behaviour; parties who disregard the decisions of either the Competition Commission or Competition Tribunal do so at their financial peril – the same can not be said about non- compliance with the Panel's rulings.

On a positive note, it would appear that the Legislature has taken note of this weakness on the part of the Panel- that is its inability to impose fines and procure criminal sanctions- and has taken remedial steps in the Companies Bill 2007. For example, the Panel which is to be reconstituted under the Bill as the Takeover Regulation Panel (TRP) will have power to procure a fine or criminal sanctions against a

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<sup>67</sup> Blackman *et al* 15A-44

<sup>68</sup> 2005 Securities Regulation Panel Annual Financial Statements. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007]

<sup>69</sup> Section 59 of Competition Act 1998

<sup>70</sup> Section 59(1) (d) (ii) as read with section 59(2) of the Competition Act 1998.

person who fails to comply with a compliance notice issued by the Takeover Special Committee.<sup>71</sup> Section 172(7) of the Companies Bill 2007 provides that,

‘If a person to whom a compliance notice has been issued fails to comply with the notice, the...Takeover regulation Panel...may either apply to Court for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution as an offence...’

The administrative penalty that the Court may impose in this event should not exceed the greater of 10% of the concerned party’s annual turnover or R 1 000 000 as per section 176(1) (b) of the Bill.

A draw back in provisions of the Bill is that the power to impose a fine or procure criminal sanctions is not bestowed upon the Panel directly. The Panel has to apply to the Court to have the fine imposed upon the non-compliant party. As it stands, the procedure in the Bill is bureaucratic and cumbersome. It would have been better for this power to be vested in the Panel itself to eliminate the necessity of an application to Court. However, notwithstanding this shortcoming, the provisions of the Companies Bill 2007 are an improvement on the current Act. They enhance the Panel’s ability to enforce the Code by empowering the reconstituted Panel to procure a fine or criminal sanctions against a non-compliant party. No longer will parties be able to ignore the Panel’s rulings with impunity. The possibility of a fine or criminal sanctions will deter parties from ignoring the Panel’s rulings.

## 2.9 Legislative Obstacles

Hitherto, the discussion of the Panel’s ability to enforce the Code has focused on the limitations arising from the enforcement procedures and powers of the Panel as provided for in the Companies Act. Over and above the limitations, it would appear that legislation such as the Constitution of the Republic of South Africa Act 108 of 1996 and the Promotion of Administrative Justice Act 3 of 2000 also affect the Panel’s ability to

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<sup>71</sup> Section 172 (7) of the Companies Bill 2007. Available at [http://www.thedti.gov.za/ccrdlawreview/part3companyBill224\\_376.pdf](http://www.thedti.gov.za/ccrdlawreview/part3companyBill224_376.pdf) [Accessed 19 November 2007]

enforce the Code by making it impossible for the Panel to make decisions expeditiously as discussed below.<sup>72</sup>

Originally, it was intended that formal legal representation would not normally be permitted at hearings and appeals before the Panel.<sup>73</sup> The introductory part of the Code still reflects this original intention. It reads ‘At hearings by the Executive Director and in appeals the case is normally presented in person by the parties or their advisers. Formal legal representation will not normally be permitted.’<sup>74</sup> The adoption by South Africa of its Constitution in 1994 and the provisions of the Promotion of Administrative Justice Act in 2000 have rendered that intention inoperative and the legal representation of persons approaching the Panel has now become the standard operating procedure.<sup>75</sup> This is because s33 of the South African Constitution provides inter alia that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>76</sup>

Further, the Promotion of Administrative Justice Act gives effect to section 33 of the Constitution.<sup>77</sup> It provides that to give effect to the constitutional right to procedurally fair administrative action, an administrator must give a person whose rights are adversely affected by administrative action a reasonable opportunity to make representations.<sup>78</sup> The Act further provides that the administrator may give such a person an opportunity to obtain assistance and, in serious or complex cases, legal representation.<sup>79</sup>

Due to the provisions of the Constitution and the Promotion of Administrative Justice Act summarised above, the Panel has to ensure that parties are given reasonable

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<sup>72</sup> See comments by the Chairperson of the Panel in the Securities Regulation Panel Financial Statements for the year ended 28 February 2005. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007]

<sup>73</sup> *supra*

<sup>74</sup> Section A: Introduction 2(e) of the Code

<sup>75</sup> Securities Regulation Panel Annual Financial Statements for year ended 28 February 2005. *supra* note 72 above.

<sup>76</sup> Section 33 (1) and (2) of the Constitution.

<sup>77</sup> Preamble to the Promotion of Administrative Justice Act 3 of 2000.

<sup>78</sup> Section 3(2) (b) (b) of the Promotion of Administrative Justice Act 3 of 2000

<sup>79</sup> Section 3 (3) (a) of the Promotion of Administrative Justice Act 3 of 2000.

opportunities to make representations and this includes allowing parties to be legally represented at hearings before the Panel. Commenting on the legal representation of parties in the Panel's proceedings, the Chairperson of the Panel, who is himself a lawyer, said:

‘As a retired attorney I support the position, but must confess that the giving of rulings and other decisions by the Panel are unfortunately considerably delayed. I believe that it is universally accepted throughout the world where takeovers and mergers are regulated, that speed is vital in the making of decisions by Regulators inter alia to ensure the integrity of the market and fairness generally to both shareholders and offerors. *The delay occasioned tends to undermine the raison d’etre for the regulation of takeovers and mergers of corporate bodies* (own emphasis).’<sup>80</sup>

In the light of the above statement, it is submitted that the provisions of the Constitution and the Promotion of Administrative Justice Act impact negatively on the Panel's ability to enforce the Code. The necessity of hearing all the parties concerned, which includes the parties' right to legal representation, leads to delays in the making of rulings and decisions by the Panel. As is made clear by the statement, speed is of the essence in the making of decisions by the Panel to ensure the integrity of the market and fairness to both shareholders and offerors. If the Panel can not expeditiously make rulings on matters brought before it, then it would have failed to meet its stated objective namely, to ensure good business standards and fairness to shareholders thus contributing to the maintenance of fair and orderly markets.<sup>81</sup>

In the case of *Goldfields Ltd v Connellan NO & Others* [2005] 3 All SA 142, Goldfields Limited brought an application before the High Court in terms of section 6(2) of the Promotion of Administrative Justice Act for a review of rulings made by the Executive Director of the Panel and by the Panel itself in relation to a takeover offer made by Harmony Gold Mining Company Limited. Among other things, Goldfields alleged that the Executive Director's actions were biased as well as procedurally unfair because he had made rulings at the instance of Harmony Gold Mining Company Limited without giving an opportunity to Goldfields to present its case. It was contented on behalf of the Executive Director of the Panel as well as the Panel that Section A (2) (c)

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<sup>80</sup> Securities Regulation Panel Annual Financial Statements for year ended 28 February 2005. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007]

<sup>81</sup> Securities Regulation Panel. Available at <http://www.srpanel.co.za/> [Accessed 9 August 2007]

of the Code entitles the Executive Director to make rulings after consulting only the applicant. The court held that the argument advanced on behalf of the Executive Director of the Panel and the Panel was sound as a general proposition but that in this case the nature of the offer demanded that the Panel adjust its adherence to the general approach. The court further said that,

‘General application of the Code needs to make way for a very specific application in view of the extreme hostility of the current bid. It is hardly appropriate to argue that in the current scenario decisions could be taken and rulings made without allowing Goldfields to make any submissions and vice versa, particularly so in respect of highly contentious issues between the parties.’<sup>82</sup>

It is submitted that the basis of the court’s reasoning on this point is hard to follow. It is not clear why the mere fact that a hostile bid is involved should preclude the Executive Director of the Panel from making ex parte rulings in terms of the Code. It has to be noted though, that one of the grounds for review relied upon by Goldfields was alleged bias on the part of the Executive. So, it could be that in arriving at the decision that it did on this point, the court was influenced by the general finding it had made earlier that Goldfields had satisfied the test showing that the Executive Director was ‘reasonably suspected of bias,’ as required by section 6 (2) (a) (iii) of the Promotion of Administrative Justice Act.<sup>83</sup>

If the earlier finding of bias was the underlying factor for the court’s decision on this point, then this does not come out clearly in the language used by the court in expressing its reasoning and decision on the point. From the passage quoted above, what emerges as the court’s reasoning on this point is that, because this was a hostile takeover situation, the Executive Director ought not to have made ex parte rulings; rather, due to the extreme hostility of the bid, he ought to have heard both parties before making his ruling. It is submitted that such reasoning would leave the Panel in a difficult position when faced with a hostile takeover situation. In such a case, the risk of being challenged on the grounds of bias may cause the Panel to refrain from making an ex parte ruling. It is further submitted that the court should have clarified that in this instance the exercise

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<sup>82</sup> *Goldfields Ltd v Connellan NO and others* [2005] 3 All SA 142 at 168a-b.

<sup>83</sup> *Supra* at 167f-g.



of the discretion to give *ex parte* rulings by the Panel's Executive Director was improper because it was tainted by bias on his part. This would have made it clear that the court's decision on this point was not so much based on the nature of the takeover bid being a hostile one but rather, on the fact that the Executive Director exercised his discretion improperly by showing bias in favour of Harmony.

The effect of this judgment is that when faced with a hostile takeover situation the Panel will be very cautious about giving *ex parte* rulings although it has such powers under the Code. In the aftermath of the court's decision in the above case, the Chairperson of the Panel noted that,

'The upshot of this judgment is that the Executive Director is now reticent to give *ex parte* rulings notwithstanding that the Code provides that... "A ruling on the application or interpretation of the Code is generally given in the first place by the Executive Director on the basis of hearing the applicant alone". *This necessity to apply PAJA [Promotion of Justice of Administrative Justice Act] and in particular the audi alteram partem principle both, slows down the entire process of potential takeovers, and may be an inhibiting factor in the launch of unsolicited hostile offers.*'<sup>84</sup>

One can almost sense a note of despair on the part of the Executive Director that when faced with a hostile takeover, there is not much that he or the Panel can do within the current legal framework which includes the Promotion of Administrative Justice Act. Clearly then, the Promotion of Administrative Justice Act affects the Panel's ability to enforce the Code. The problem is serious enough that the Panel took legal advice concerning the possibility of having the Panel exempted from the application of the provisions of the Promotion of Administrative Justice Act as provided for in that Act.<sup>85</sup>

Another dimension of the problems associated with the Promotion of Administrative Justice Act is that the possible intervention of the courts – by way of judicial review - during the process of a takeover could give rise to abuse of court process with parties taking tactical litigation so as to frustrate a hostile takeover bid.<sup>86</sup> To be clear, this potential problem was not brought in by the Promotion of Administrative

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<sup>84</sup> Securities regulation panel annual financial statements for the year ended 28 February 2006. Available at <http://www.srpanel.co.za/Annual%20Report%202006.pdf> [Accessed 21 November 2007]

<sup>85</sup> *supra*

<sup>86</sup> *supra*

Justice Act per se since the judicial review procedure is also available under the common law. The Promotion of Administrative Justice Act is mentioned in this regard since it, as read with the Constitution, is now the source of the court's power of judicial review.<sup>87</sup>

As discussed earlier, speed is of the essence in the making of decisions by the Panel to ensure the integrity of the market and fairness to both shareholders and offerors. The possibility that a party can approach the court during the course of a takeover bid for judicial review of a decision of the Panel has the potential of impeding the progress of a takeover bid and could possibly result in the frustration of an offer. The courts in the UK have recognized the need for speed and to guard against tactical litigation in takeovers as evidenced by the case of *R v Take over Panel, Ex parte Guinness Plc* where the Court of Appeal said that,

‘When the take-over is in progress the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on the rulings of the [London] panel so great, that contemporary intervention by the court will usually be impossible or contrary to the public. Furthermore it is important that this should be known, otherwise attempts would undoubtedly be made to undermine the authority of the panel by tactical applications for judicial review.’<sup>88</sup>

Thus the approach taken by the courts in the UK in relation to judicial review of the decisions of the [London] Panel is that the courts will allow the contemporary decisions of the [London] Panel to take their course, considering the complaint and intervention, if at all, later and in retrospect by declaratory orders which would enable the [London] Panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules.<sup>89</sup> It would appear that the courts in South Africa have not adopted a similar approach and so would treat an application for review of a Panel decision just like any other application for review.

In its favour, it must be said of the Promotion of Administrative Justice Act that it limits the potential for abuse of the judicial review procedure by requiring that, ‘no

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<sup>87</sup> Cora Hoexter *Administrative law in South Africa* 1 ed (2007) 114 -115

<sup>88</sup> *R v Take-over Panel, Ex Parte Guinness Plc* [1990] 1 Q.B. 146 at 158G

<sup>89</sup> *R v Take-over Panel, Ex Parte Datafin Plc* [1987] 1 Q.B. 815 at 842D

court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.’<sup>90</sup> At common law, the mere provision of statutory internal remedies was not itself sufficient to imply an intention to bar access to judicial review until the statutory remedies had been exhausted.<sup>91</sup> Thus under the Promotion of Administrative Justice Act a party would have to exhaust all the internal appeal procedures of the Securities Regulation Panel before it can avail itself of the judicial review procedure in terms of the Act.

However, a court or tribunal may, in exceptional circumstances and if the court or tribunal deems it in the interests of justice, exempt a party from the obligation to exhausting internal remedies.<sup>92</sup> Thus the possibility for abuse of the judicial review still exists notwithstanding the requirement to exhaust internal remedies. In *Goldfields Ltd v Connellan NO & Others*, Goldfields was exempted from the obligation to exhaust internal remedies as the court was satisfied that exceptional circumstances existed in that case since Goldfields had established a reasonable suspicion of bias on the part of the Panel’s Executive Director.<sup>93</sup> It is interesting that the court also found that,

‘There are further facts which would constitute “exceptional circumstances” in terms of PAJA [Promotion of Administrative Justice Act] section 7(2) (c): *the SRP [the Panel] generally has not had to deal with hostile takeovers; this takeover bid has been exceptionally hostile*(Own emphasis); in the words of the Executive Director himself there has been huge pressure on him as a result of the demands of the parties herein and such pressure is evident from the letters to the Executive Director...These considerations add to the conclusion that Goldfields has shown exceptional circumstances within the requirements of PAJA. The exceptional circumstances stated above are such that it is in the interests of justice that this court decides the issues placed before it.’<sup>94</sup>

What is interesting is that the court lists, as some of the considerations pointing to exceptional circumstances, the fact that the Panel generally has not had to deal with hostile takeovers and that the takeover bid in this case was exceptionally hostile. It is submitted that this opens up an avenue for abuse of the judicial review procedure. In a hostile takeover situation the target company attempting to stymie the hostile bid can

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<sup>90</sup> Section 7(2) (a) of the Promotion of Administrative Justice Act 3 of 2000.

<sup>91</sup> Lawrence Baxter *Administrative Law* 1ed (1984) 720

<sup>92</sup> Section 7(2) (c) of the Promotion of Administrative Justice Act 3 of 2000.

<sup>93</sup> *Goldfields Ltd v Connellan NO and others* [2005] 3 All SA 142 at 169g

<sup>94</sup> *supra* at 169i -170b

easily bypass the Panel's internal remedies and engage in tactical litigation by challenging Panel decisions through the judicial review process. In such a case the target company would plead the hostility of the bid as an exceptional circumstance justifying the court's intervention during the takeover process and exempting the target company from the requirement to exhaust internal remedies. The fact that in such a case the court has to satisfy itself that special circumstances exist before it can review the Panel's decision means that the court has to make an enquiry to establish the existence of such special circumstances. Valuable time could be lost in the process, and the delay occasioned by such tactical litigation may result in an offer being frustrated in terms of rule 28.6(a) of the Code. Thus in this respect, the judicial review procedure provided for in the Promotion of Administrative Justice Act has the potential of undermining the functions of the Panel, particularly in hostile takeover situations.

In concluding this chapter, the enforcement procedure provided for under the Act has been shown to be flawed to in that it does not expressly empower the Panel to make binding decisions and rulings on the Code. The effectiveness of sanctions for non-compliance with the Code appears to be compromised to the extent that they depend on the willingness of parties to abide by the Panel's rulings. This situation is not helped by the Panel's lack of power to procure fines or criminal sanctions against non-compliant a parties. In addition, the Panel's role as enforcer of the Code is undermined by the fact that the Panel has to have recourse to the courts to enforce the Code. Enforcing the Code through the courts has the potential that takeover bids may be frustrated due to the lapsing of the takeover time table. The necessity for the Panel to comply with the provisions of the Constitution of South Africa as well as the Promotion of Administrative Justice Act leads to delays in the takeover process thus impacting on the Panel's ability to maintain the integrity of the market.

## CHAPTER 3

### 3.1 ENFORCEMENT OF THE UK CITY [LONDON] CODE

The South African Securities Regulation Code [the ‘Code’] states that it is based to a large extent on the City Code [the ‘London Code’] issued by the London Panel.<sup>95</sup> On the other hand, the South African Panel, which administers the Code, was established subsequent to a study of the London Panel and the London Code undertaken by Judge Margo and Professor Naude.<sup>96</sup> There is thus a close relationship between the South African Panel and the London Panel. Hence in discussing the South African Panel’s effectiveness in enforcing the Code, valuable insights may be gained by comparing the London Panel’s experience in enforcing the London Code with the Panel’s own experience. In this chapter, parallels will be drawn between the nature of these two bodies, the enforcement procedures as well as sanctions used, the role of the courts in the enforcement process and the support given to either body in its enforcement role by other regulatory bodies. In drawing the parallels it is hoped that the London Panel’s experience in enforcing the London Code might shed some light on how the South African Panel’s ability to enforce the Code may be improved.

### 3.2 Nature of the London Panel

The London Panel was established in 1968 as a self regulatory body.<sup>97</sup> Since its establishment in 1968, the London Panel had no statutory basis and it did not impose any legal sanctions.<sup>98</sup> The City Code administered by the London Panel also lacked statutory backing.<sup>99</sup> However, following the implementation of the European Union Directive on Takeover Bids<sup>100</sup> in the United Kingdom in 2006, the London Panel was

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<sup>95</sup> Explanatory Note 1(c) of The Securities Regulation Code on Take-Over and Mergers

<sup>96</sup> C Margo and S Naude ‘Take-overs and mergers: the City Panel and the position in South Africa’ *Report to the Standing Advisory Committee on Company Law* (1983) at 1.

<sup>97</sup> S Kenyon-Slade *Mergers and takeovers in the US and UK law and practice* 1 ed (2004) 506

<sup>98</sup> G K Morse ‘The city code on takeovers and mergers – self regulation or self protection?’ [1991] *JBL* 509

<sup>99</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin* [1987] 1QB 815 at 825

<sup>100</sup> European Union Directive on Takeovers 2004/25/EC

designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers and at the same time the City Code was accorded statutory force.<sup>101</sup> The London Panel's regulatory functions are now provided for in Chapter 1 of Part 28 of the UK's Companies Act 2006.<sup>102</sup> Under s 943 of the Act the London Panel is invested with a statutory rule-making power to make rules relating to the regulation of mergers and takeovers as well as similar types of transactions including matters that were already covered by the London Code as at the date of the passing of the Act. It should be noted that this Act does not confer the status of a statutory body on the London Panel; it remains an unincorporated body, as constituted from time to time, and, as such, has rights and obligations under the common law.<sup>103</sup>

At the time that the establishment of the South African Panel was under consideration in 1982, one issue that Judge Margo and Professor Naude had to resolve was whether South Africa should follow the example of the UK by setting up a non-statutory self-regulatory body such as the then London Panel or to set up a regulatory body with statutory backing. In their recommendation to the Standing Advisory Committee on Company law they expressed the belief that a system of completely voluntary self-discipline was not practicable in South Africa; they also expressed grave doubts about the efficacy of the [London] City Panel's type of sanctions in the South African context.<sup>104</sup> Thus they favoured the creation of a statutory Panel and expressed their satisfaction that appropriate and effective sanctions could be designed.<sup>105</sup> The result was the creation of a statutory regulatory Panel under s 440B of the South African Companies Act.

Presumably, the rationale behind the recommendation for a statutory regulatory body as opposed to a non-statutory one was that the former would have statutory

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<sup>101</sup> ss 1 and 2(a) of The City Code on Takeovers and Mergers. Available at <http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf> [Accessed 11 August 2007].

<sup>102</sup> Part 28 of the Companies Act 2006 came into force on 6 April 2007 as per The Companies Act 2006 (Commencement No.2 Consequential Amendments, Transitional Provisions and Savings) Order 2007 published in SI 2007/1093 Available at [http://www.opsi.gov.uk/si/si2007/uksi\\_20071093\\_en.pdf](http://www.opsi.gov.uk/si/si2007/uksi_20071093_en.pdf) [Accessed 11 August 2007].

<sup>103</sup> Explanatory note 1181 of United Kingdom Companies Act 2006. Available at <http://www.opsi.gov.uk/acts/en2006/06en46-v.htm> [Accessed 11 August 2007].

<sup>104</sup> C Margo and S Naude 'Take-overs and mergers: the City Panel and the position in South Africa' *Report to the Standing Advisory Committee on Company Law* (1983) at 33-34.

<sup>105</sup> *supra*.

backing and thus would have more clout in enforcing the Code. However, as shown in the previous chapter, the effectiveness of the South African Panel in enforcing the Code is questionable because of, among other things, the non-binding status of the Panel's rulings, the Panel's lack of power to impose fines and criminal sanctions and, in general, the enforcement procedure that entails involvement of the courts. On the other hand, notwithstanding its non-statutory basis, the London Panel is generally considered to have proved effective in regulating take-over bids in the United Kingdom.<sup>106</sup> It has been described as a truly remarkable body that performs the function of overseeing and regulating a very important part of the United Kingdom financial market without any visible means of legal support.<sup>107</sup> An interesting fact is that the London Panel has managed to enforce the London Code despite its lack of statutory powers. How it does this is discussed below.

### 3.3 London Panel Sanctions

It is worth noting that prior to the implementation of the European Union Takeover Directive in the UK in 2006,<sup>108</sup> the London Panel's primary sanctions for breaches of the Code were a private or public reprimand;<sup>109</sup> These sanctions are similar to the sanctions available to the South African Panel whereby it enforces the Code by, among other things, notification to interested parties as well as by general publication of an announcement that the requirements of the Code have not been complied with.<sup>110</sup> Enforcement of the London Code by way of a public reprimand has not always yielded satisfactory results; in some instances publicising breaches of the London Code has aroused resentment and in others the London Panel's rulings have been questioned and even their general authority has not always been acknowledged.<sup>111</sup> The effectiveness of

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<sup>106</sup> A Johnston *The city take-over code* 1ed (1980) 123

<sup>107</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin* [1987] 1QB 815 at 824.

<sup>108</sup> European Union Directive on Takeovers 2004/25/EC was initially implemented in the UK by The Takeovers Directive (Interim Implementation Regulations) 2006 [SI No.1183 of 2006] which came into force on 20<sup>th</sup> May 2006 and were subsequently replaced by the UK Companies Act of 2006

<sup>109</sup> Thomas R Hurst 'Self regulation versus legal regulation' (1984) 5 (4) *Co Law* 161 at 168.

<sup>110</sup> Explanatory Note 1 (c) of the Code.

<sup>111</sup> A Johnston *The city take-over code* 1ed (1980) 52

such sanctions as a tool for enforcing the London Code is thus questionable as is the case with the South African Panel.

### **3.4 Enforcement of London Code through the Courts**

Unlike the South African Panel that has power to enforce its Code through the courts by virtue of the provisions of s 440M of the South African Companies Act, the London Panel could not enforce the London Code through the courts prior to the implementation European Union Takeover Directive in the UK in 2006. This is because the London Panel and the London Code had no statutory basis. For a long time the London Panel's effectiveness in enforcing the London Code was questioned because of this lack of legal enforcement powers.<sup>112</sup> Perhaps it was this perceived shortcoming that led South Africa to opt for a statutory Panel as opposed to a non-statutory one.

The implementation of the European Union Takeover Directive in the UK saw the London Panel being placed within a statutory framework and invested with powers to enforce the London Code by application to court.<sup>113</sup> Enforcement of the London Code through the courts is provided for in s 955 of Part 28 of Chapter one of the UK Companies Act 2006. Section 955(1) provides that,

‘If on the application of the [London] Panel, the court is satisfied that there is a reasonable likelihood that a person will contravene a rule-based requirement or that a person has contravened a rule-based requirement or disclosure requirement, the court may make any order it thinks fit to secure compliance with the requirement.’

The provisions of this section are similar to the provisions of s 440M of the South African Companies Act that empowers the Panel to apply to Court for an interdict or an order of specific performance against a person who has or is likely to contravene the Code. In the previous chapter it was pointed out that in South Africa, the procedure of enforcing the Code through the courts has the potential of frustrating a takeover offer by interrupting the takeover timetable. It was also noted that the procedure undermines the role of the Panel as the interpreter of the Code in that in the event of an application to

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<sup>112</sup> Thomas R Hurst ‘Self regulation versus legal regulation’ (1984) 5 (4) *Co Law* 161 at 168

<sup>113</sup> Section 11 of Takeovers Directive (Interim Implementation Regulations) 2006 [SI No.1183 of 2006] Available at <http://www.opsi.gov.uk/SI/si2006/20061183.htm> [Accessed 21 December 2007]



court by the Panel, a court in South Africa would hear the matter de novo to satisfy itself on the merits.

It would appear that the risk of interruption to the running of a takeover bid process also attaches to the procedure of enforcing the London Code through the courts as provided for under the UK Companies Act 2006. This is due to the fact that if the London Panel seeks an order to enforce the London Code during the course of a takeover bid, the courts would have to respond to the application as required by the UK Companies Act 2006 notwithstanding the judgments of the Appeal Court in *Ex Parte Datafin* and *Ex Parte Guinness* where the court expressed its reluctance to undermine or encroach upon the Panel's effectiveness by intervening during the course of a takeover bid.<sup>114</sup> However, this risk as well as the risk that the role of the London's Panel as interpreter of the London Code could be undermined as a result of the courts having to re-hear the merits of a case when the London Panel applies for a court order in terms s 955(1) of the UK Companies Act 2006, appear to have been minimised in the UK since,

‘It is expected that in accordance with usual practice, the court will not, in exercising its jurisdiction under this section, rehear substantively the matter or examine the issues giving rise to the ruling or, as the case may be, the request for documents or information except on "judicial review principles", where there has been an error of law or procedure.’<sup>115</sup>

Thus it would appear that unless there was an error of law or procedure, a court in the UK, unlike the South African courts, would summarily enforce a ruling of the London Panel without examining the merits of the London Panel's decision. It is submitted that this accords a greater degree of respect to the London Panel's role as the interpreter and enforcer of the London Code.

### 3.5 Panel Powers

Since its establishment in 1968 the London Panel, like its South African counterpart, does not have power to impose fines or criminal sanctions. Implementation of the

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<sup>114</sup> Christopher Saul ‘United Kingdom: UK takeover regulation: no change or sea change?’ 2005 Supplement to the *International Financial Law Review* Available at <http://www.iflr.com/?Page=17&ISS=16143&SID=508304> [Accessed on 24 December 2007]

<sup>115</sup> Explanatory notes to the UK Companies Act 2000 available at <http://www.opsi.gov.uk/acts/acts2006/en/06en46-v.htm> [Accessed 24 December 2007]

European Union has not changed this position as it was decided not give the London Panel power to impose fines.<sup>116</sup> However, unlike in the case of the South African Panel, the lack of penal powers on the part the London Panel does not mean that parties who do not comply with the London Panel's rulings go unpunished. The London Panel can impose disciplinary measures indirectly by reporting non-compliant parties to other regulatory bodies as discussed below.

### 3.6 Support from Other Bodies

In addition to the sanctions of a private or public reprimand, the London Panel has the option to enforce the Code indirectly by enlisting the help of other regulatory agencies such as the Department of Trade and Industry (DTI), the London Stock Exchange, the Financial Services Authority (FSA), the Securities and Investments Board (SIB) and other Self Regulating Organisations (SROs).<sup>117</sup> The SIB and other regulatory bodies have adopted what are described as 'cold shoulder rules' which require investment businesses not to act for persons whom they have reason to believe would not comply with the London Panel's rulings.<sup>118</sup> Thus it was observed in *R v Panel on Takeovers and Mergers, Ex Parte Guinness* that, 'The panel has no de jure power to do anything, but it wields immense de facto power and influence by means of the support of others who have the power to render untenable the position in the market of those who do not choose to co-operate with the panel.'<sup>119</sup> What would happen in practice is that if a party, say one regulated by the SIB, breached the London Code, the London Panel could request the SIB to take action against the offending party and thus enforce the London Code indirectly through the powers that the SIB has over those parties falling under its jurisdiction.

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<sup>116</sup> Christopher Saul 'United Kingdom: UK takeover regulation: no change or sea change?' 2005 Supplement to the *International Financial Law Review* Available at <http://www.iflr.com/?Page=17&ISS=16143&SID=508304> [Accessed on 24 December 2007]

<sup>117</sup> Takeover Panel, Annual Report for the year ended 31 March 1987. Available at <http://www.thetakeoverpanel.org.uk/new/reports/DATA/Report1987.pdf> [Accessed on 19 November 2007]

<sup>118</sup> Alexander of Weedon, Q.C. 'Takeovers: the regulatory scene' [1990] *JBL* 203, 213. See also MAR 4.3.1 (in the Business Standards Block, Market Conduct Module) of the FSA Handbook Available at <http://fsahandbook.info/FSA/html/handbook/MAR/4/3> [Accessed 23 December 2007]

<sup>119</sup> *R v Panel on Takeovers and Mergers, Ex Parte Guinness* [1990] 1 QB 146 at 180H-181A

It is submitted that the London Panel owes much of its success in enforcing the London Code to the support rendered to it by these other regulatory bodies. For, without this support, the London Panel lacked statutory investigative powers to monitor compliance with the London Code<sup>120</sup> and it did not have power to impose any legal sanctions.<sup>121</sup> Without this support, the most the London Panel could rely on was the power of moral persuasion based on the hope that non-compliant parties would take heed of the private and or public reprimands issued by the London Panel. Complementary support from other regulatory bodies gives teeth to the London Panel's rulings. The threat of sanctions from the respective regulatory bodies deters parties from ignoring the London Panel's ruling. In comparison, the South African Panel is in a weak position because parties can ignore its rulings with impunity unless the Panel takes the extra step of enforcing the Code through the courts.

Another important point to note here is that the enforcement support enjoyed by the London Panel comes from several regulatory bodies cited above. It has been said that,

'[U]nder the Financial Services and Markets Act 2000, *the full rigors of the entire UK securities industry* (own emphasis) are ostensibly available to ensure compliance with the City Code. Legal sanctions, suspension, or delisting by the UKLA (United Kingdom Listing Authority), the threat of exclusion of malfeasants by participants in the securities markets, the withdrawal by the FSA or the applicable self-regulatory body of authorization of a person and/or its financial and other advisers to conduct securities business in the UK...are all highly effective in supplementing the Panel's own traditional sanctions of private or public censure.'<sup>122</sup>

It is submitted that this enforcement support from other regulatory bodies spanning the entire UK securities industry sets the London Panel apart from its South African counterpart. The South African Panel, despite – or may be because of - its statutory basis, does not appear to wield this immense indirect power that its counterpart in the UK has. It would appear that the Panel has little enforcement support from other players in the securities industry to complement it in its role as enforcer of the Securities Regulation Code.

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<sup>120</sup> GK Morse 'The City code on takeovers and mergers – self regulation or self protection? (1991) *JBL* 509 at 515

<sup>121</sup> *supra* at 509

<sup>122</sup> Stephen Kenyon-Slade *Mergers and takeovers in the US and UK law and practice* 1ed (2004) 509

For its part, the Johannesburg Stock Exchange (JSE) which is the equivalent of the Financial Services Authority (FSA) in its capacity as the listing authority in the UK,<sup>123</sup> states that, ‘The JSE supports the Securities Regulation Code, but the Code does not form part of the Listings Requirements.’<sup>124</sup> There is no express indication of the practical ways and means that the JSE supports the Securities Regulation Code. This stands in sharp contrast to the express and practical support given to the London Panel by the Financial Services Authority. For instance, prior to the enactment of the UK Companies Act 2006, section 143(1) (a) of the UK Financial Services and Markets Act 2000 used to provide that, ‘The Authority [FSA] may make rules (“endorsing rules”) endorsing the City Code on Takeovers and Mergers issued by the Panel on Takeovers and Mergers.’ Section 143 (3) further provided that, ‘At any time when endorsing rules are in force, and if asked to do so by the [London] Panel, the Authority [FSA] may exercise its powers under Part IV or section 66 as if failure to comply with an endorsed provision was a ground entitling the Authority to exercise those powers.’.

Thus s143 of the Financial Services and Markets Authority expressly authorised the FSA to make rules endorsing the City [London] Code issued by the London Panel and to discipline parties who breached the code. The section was described as an important provision which gave disciplinary “teeth” to the London Code.<sup>125</sup> Although section 143 has since been repealed by s 964 of the UK Companies Act 2006, its repeal does not preclude the London Panel from reporting breaches of the Code by authorised persons in relation to takeover bids to the Financial Services Authority as before, and any such breaches will still be taken into account by the FSA, for example, in assessing whether such persons are fit and proper to be authorised for business of that kind or have otherwise complied with their regulatory obligations.<sup>126</sup> Further, although the FSA’s power under s 143 to make rules endorsing the London Code has been repealed, the FSA has used its general rule making powers under s138 as read with ss 145,156 and 157 of the Financial Services and Markets Act 2000 to make rules in support of the London

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<sup>123</sup> Section 72 of the UK Financial Services and Markets Act 2000 makes the FSA the competent authority for the purposes of listing securities in the UK.

<sup>124</sup> Section 9 of the Johannesburg Stock Exchange (JSE) Listing Requirements.

<sup>125</sup> E. Lomnicka *The financial services and markets act: an annotated guide* 1 ed (2002) 244

<sup>126</sup> Explanatory Note to the UK Companies Act 2006 Available at <http://www.opsi.gov.uk/acts/acts2006/en/06en46-v.htm> [Accessed 26 December 2007]

Panels' functions.<sup>127</sup> Thus the FSA offers practical support to the London Panel by using its own statutory powers to strengthen the latter's position in enforcing the London Code

The JSE has significant power to censure and penalise non compliance with its Listing Requirements which could be used to support the Panel in its enforcement role in the same way the FSA supports the London Panel. For instance, the JSE can impose a fine of R1 000 000, suspend or terminate the listing of any securities of a particular issuer for a breach of the listing requirements.<sup>128</sup> Given that the Panel lacks power to impose sanctions on non-compliant parties, the JSE could have strengthened the Panel in enforcing the Code by requiring companies that are subject to the JSE's listing requirements to abide by the Code and the Panel's rulings failing which the JSE's disciplinary powers would be invoked.

Should it not be possible for the JSE to support the Panel in such a formal manner, at least it should do so indirectly by subjecting parties who fail to abide by the Code or the Panel's rulings to thorough scrutiny of their suitability for listing or other approvals which it is in the power of the JSE to grant. Such an informal approach could enhance enforcement of the Code in that parties are likely to abide by the Code or rulings of the Panel where they know that their applications to the JSE for listing or other approval will be thoroughly scrutinised depending on their track record of observing the Code or rulings of the Panel. As things stand presently, the JSE's statement to the effect that, 'the JSE supports the Securities Regulation Code, but the Code does not form part of the Listings Requirements,' does not do much to enhance the Panel's effectiveness in enforcing the Code. It would have been ideal if the JSE offered the Panel the kind of practical enforcement support offered to the London Panel by the FSA.

Further, in the United Kingdom as well as in South Africa, financial services providers such as investment banks play an important role in the context of mergers and takeovers by acting as financial advisors to the companies involved. The importance of such advisors is recognised in the Code which makes reference to their role during a

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<sup>127</sup> See MAR 4.3 (in the Business Standards Block, Market Conduct Module) of the *FSA Handbook* Available at <http://fsahandbook.info/FSA/html/handbook/MAR/4/3> [Accessed 26 December 2007]

<sup>128</sup> Sections 1.20 (c), 1.6(b), and 1.11(b) respectively of the JSE Listing Requirements.

takeover.<sup>129</sup> The FSA, which regulates all financial services providers in the UK, has devised the cold shouldering rule referred to earlier which states that,

‘ a firm must not act, or continue to act, for any person connection with a transaction to which the Takeover Code applies... if the firm has reasonable grounds for believing that the person in question, or his principal, is not complying or is not likely to comply with the Takeover Code.’<sup>130</sup>

The effect of this cold shouldering rule is that a party that contravenes the London Code or does not comply with the ruling of the London Panel will find itself isolated in the market with no financial services provider willing to act for it unless and until it brings itself into compliance. Thus the rule complements the London Panel in its enforcement role.

In comparison, it would appear that there is no similar provision in South Africa to complement the Panel in its enforcement role. One would have expected legislation such as the Financial Advisory and Intermediaries Services Act 37 of 2002 governing financial services providers in South Africa to have provisions that ensure that financial services providers do not act for parties that are not in compliance with the Code or rulings of the Panel. However, that Act does not make any mention of the Panel and neither does it offer any enforcement support to the Panel along the lines of the support given to the London Panel by the Financial Services and Markets Act 2000 in the UK.

In addition, one would also have expected the Securities Services Act No. 36 of 2004 which provides for the regulation and supervision of securities services in South Africa to offer some kind of enforcement support to the Securities Regulation Panel. It would appear that there is no provision in that act providing such enforcement support except for section 86(4) which allows the Directorate of Market Abuse to share information of any matters dealt by it with the Panel. While this sharing of information assists the Panel in monitoring compliance with the Code, it is submitted that more could be done to bring the disciplinary powers of these other regulatory agencies to strengthen the Panel in enforcing the Code.

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<sup>129</sup> See rule 2.3 and 3 the Code.

<sup>130</sup> MAR 4.3.1 (in the Business Standards Block, Market Conduct Module) of the *FSA Handbook* Available at <http://fsahandbook.info/FSA/html/handbook/MAR/4/3> [Accessed 23 December 2007]

An objection that might be raised against the arrangements urged above is that the London Panel enjoyed support from other regulatory agencies precisely because it lacked the statutory basis to impose any legal sanctions of its own whereas the South African Panel is a statutory regulatory body and thus does not need to rely on the disciplinary powers of other statutory bodies. The answer to this objection is that while the Panel is indeed a statutory body, the legislature did not invest it with meaningful disciplinary powers and, in the absence of any legislative solution to equip the Panel with the necessary powers, the Panel needs to be complemented by other regulatory bodies within the industry that do have effective disciplinary powers. After all, the Panel is given support by other regulatory bodies in its role of monitoring compliance with the Code notwithstanding that it has its own statutory investigative powers. For instance, section 86(4) of the South African Securities Services Act No. 36 of 2004 authorises the Directorate of Market Abuse to share information of any matter dealt by it with the Panel.

### **3.7 Power to make rulings and directions**

One of the shortcomings of the South African Panel highlighted in chapter 2 is that the Panel does not appear to have express statutory authority to make rulings on the provisions of the Code. In contrast, the London Panel has power to make rulings and directions under the UK Companies Act 2006. Section 945(1) of that Act expressly states that, ‘The Panel may give rulings on the interpretation, application or effect of rules.’ The rules referred to here are the rules contained in the London Code. In light of this provision, there can be no doubt, as exists in the case of the South African Panel, about the London Panel’s power to make rulings on the provisions of the London Code.

What is more, s 945(2) of the UK Companies Act 2006 makes clear what the status of rulings made by the London Panel is by stating that, ‘To the extent and in the circumstances specified in rules, and subject to any review or appeal, *a ruling has binding effect* (own emphasis).’ In contrast, the status of rulings given by the South

African Panel is not specified in the South African Companies Act and it has been opined that the rulings appear to be non-binding.<sup>131</sup>

In addition to the power to make rulings on the provisions of the London Code, the London Panel is also expressly empowered to give directions. Section 946 of the UK Companies Act 2006 provides that ‘the rules [in the London Code] may contain provision conferring power on the Panel to give any direction that appears to the Panel to be necessary in order... to secure compliance with the rules.’ According to the explanatory note to the UK Companies Act 2006, this section allows the Panel to make provision in its rules for it to give a direction preventing a person from breaching the rules or otherwise to ensure compliance with the rules.<sup>132</sup> Pursuant to this power the London Panel appears to have made a rule providing for the making of compliance rulings by the London Panel.<sup>133</sup> Section 954 of the Act also provides for the making of rules in the London Code empowering the London Panel to make compensation rulings. Pursuant to this power the London Panel has made a rule empowering it make a ruling requiring a person who has contravened certain rules of the London Code to pay such compensation as it thinks just.<sup>134</sup>

Section 943(1) obligates the London Panel to make rules giving effect to certain provisions of the European Union Takeover Directive. It has been said that if the London Panel then made a rule that was inconsistent with the principles of the Directive or that did not fully implement the Directive, the Panel would be taken to be acting outside its prescribed powers and as such the rule would be ultra vires. This would give some scope to parties to challenge the Panel's rulemaking powers under the new regime and thus giving rise to tactical litigation.<sup>135</sup> It is submitted that apart from this concern, the concise statutory pronouncement of the London Panel's authority to make rulings as well as the status of such rulings minimises the risk of parties legally challenging the

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<sup>131</sup> Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-44

<sup>132</sup> Explanatory Notes to the UK Companies Act 2006 Available at <http://www.opsi.gov.uk/acts/acts2006/en/06en46-u.htm#end> [Accessed 24 December 2007]

<sup>133</sup> Section 10(b) of the Introduction to the London Code

<sup>134</sup> Section 10(c) of the Introduction to the London Code

<sup>135</sup> Christopher Saul ‘United Kingdom: UK takeover regulation: no change or sea change?’ 2005 Supplement to the *International Financial Law Review* Available at <http://www.iflr.com/?Page=17&ISS=16143&SID=508304> [Accessed on 24 December 2007]



London Panel's authority to make rulings on the provisions of the Code. The same cannot be said of the South African Panel whose power to make rulings is open to question. It is hoped that the South African legislature will follow the example of its UK counterpart and clearly lay out in statute what rulings the Panel can make and the status of such rulings.

### 3.8 Investigative Powers

The existence of an effective monitoring system to ensure compliance with the Code is a *sine qua non* for the Panel to effectively enforce the Code. The South African Panel has statutory investigative powers that adequately equip it to monitor compliance with the Code. By contrast, since its establishment in 1968 up to May 2006 when the UK Companies Act 2006 was passed, the London Panel lacked statutory investigative powers to monitor compliance with the Code; thus it could not demand the production of documents, compel the attendance of witnesses or examine them on oath nor did it have powers to appoint investigators.<sup>136</sup> This lack of investigative powers handicapped the London Panel in monitoring compliance with the London Code and constituted one of the grounds upon which the London Panel was criticised.<sup>137</sup> However, the Panel enjoyed support from the FSA in that persons authorised under the Financial Services and Markets Act 2000 are required by the rules of the Financial Services Authority to provide information and assistance to the Panel.<sup>138</sup> In relation to others, the Panel had to rely on the voluntary co-operation of market participants to provide explanations and documents which are not publicly available.<sup>139</sup>

The London Panel's lack of investigative powers was addressed by the UK Companies Act 2006 which gave the London Panel power to require production of documents and information reasonably required by it in connection with the exercise of

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<sup>136</sup> GK Morse 'The City code on takeovers and mergers – self regulation or self protection?' (1991) *JBL* 509 at 515. Section 946 of the UK Companies Act 2006 now empowers the London Panel to require production of documents and information.

<sup>137</sup> Thomas R Hurst 'Self regulation versus legal regulation' (1984) 5 (4) *Co Law* 161 at 169

<sup>138</sup> MAR 4.3.5 (in the Business Standards Block, Market Conduct Module) of the FSA Handbook Available at <http://fsahandbook.info/FSA/html/handbook/MAR/4/3> [Accessed 26 December 2007]

<sup>139</sup> Explanatory Note to UK Companies Act. Available at <http://www.opsi.gov.uk/acts/acts2006/en/06en46-u.htm#end> [Accessed 26 December 2007]

its functions. Section 947 of the Act provides that the London Panel may, by notice in writing, require a person to produce any documents or to provide such information as may be specified or described in the notice. The powers entrusted to the London Panel under s 947 are similar to the powers invested in the South African Panel by s 440D of the South African Companies Act which empowers the Panel to summon a person to furnish information or provide a document in his possession that has a bearing on a matter under investigation. The difference between the two provisions is that under s 440D (3) of the South African Act failure or refusal to provide information or to produce a document in one's possession constitutes an offence whereas s 947 of the UK Companies Act 2006 is silent as to the consequences of failure to produce the required documents or information. It is ironic that the South African legislature saw fit to give teeth to the Panel's investigative powers by criminalising failure to produce a document or information required by the Panel yet it did not prescribe penalties for not complying with the Panel's rulings or at least empower the Panel to impose fines for non compliance. It is submitted that this legislative inconsistency undermines the South African Panel's effectiveness in enforcing the Code.

### 3.9 Role of the Courts

In the case of *R v Panel on Takeovers and Mergers, Ex parte Datafin Plc* [1987] Q.B. 815 two of the issues that the Appeal Court in England had to decide were: whether the decisions of the London Panel were susceptible to judicial review - the "jurisdictional" issue and, if so, how in principle that jurisdiction was to be exercised given the nature of the panel's activities and the fact that it is an essential part of the machinery of a market in which time is money in a very real sense - the "practical" issue.<sup>140</sup> On the "jurisdictional" issue, the court ruled that the decisions of the London Panel- a non-statutory self-regulatory body administering a non-statutory Code of rules- was subject to judicial review by the English courts. The rationale for the court's judgment on this point was that the London Panel performed a public function. The court went on to clarify that an application for judicial review is not an appeal to a decision of the Panel;

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<sup>140</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin plc* [1987] Q.B. 815, 834

‘The panel and not the court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the court is wholly different. It is, in an appropriate case, to review the decision of the panel and to consider whether there has been "illegality," i.e., whether the panel has misdirected itself in law...’<sup>141</sup>

On the “practical issue” the Appeal Court made it clear that in any given case the courts would limit their intervention to reviewing the London Panel’s decisions after the conclusion of the takeover bid process. The importance of this ruling lies in the court’s recognition of the special nature and functions of the London Panel as well as the need that decisions of the London Panel be given speedily with minimal judicial intervention. The court said,

‘Nevertheless, I wish to make it clear beyond peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel’s rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest.’<sup>142</sup>

Thus the *Datafin* case established the jurisdiction of the courts and the limitations on its exercise with respect to the London Panel. This judgment was reaffirmed in the case of *R v Panel on Takeovers and Mergers, Ex Parte Guinness plc* [1990] Q.B. 146. In this latter case the Appeal court further explained that when the takeover is in progress the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on the rulings of the panel so great, that contemporary intervention by the court will usually either be impossible or contrary to the public interest. Furthermore it is important that this should be known, as otherwise attempts would undoubtedly be

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<sup>141</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin plc* [1987] Q.B. 815, 842

<sup>142</sup> *supra*.

made to undermine the authority of the panel by tactical applications for judicial review.<sup>143</sup>

The approach of the appeal court in England was informed by the realisation of the need for speed during takeovers and also recognition of the real possibility that the judicial review procedure could be abused by takeover targets seeking to defeat a takeover bid. By contrast it would appear that the South African judicial review procedure provided for in the Promotion of Administrative Justice Act No. 3 of 2000 does not take into account the special nature of the Panel and its functions as the courts in England do. The approach of the court in the earlier cited case of *Gold Fields Ltd v Connellan NO & Others* [2005] 3 All SA 142 shows that, unlike the courts in England, South African courts would intervene during the course of a takeover bid thus there is a real possibility that tactical applications for judicial review could be employed to frustrate takeover bids in South Africa.

The ‘historic rather than contemporaneous’ approach of the English courts provide certainty in relation to the decisions of the London Panel enabling market participants to act on the basis of the validity of the London’s decisions.<sup>144</sup> The drawback of the English courts’ ex post facto intervention is that should the court subsequently find that the London Panel’s decision was erroneous it would be difficult to unravel the particular transactions sanctioned by the London Panel on the basis of that erroneous decision. However, the benefits of the approach –speed, certainty and prevention of tactical litigation- outweigh its disadvantages. Therefore it is recommended that the South African courts adopt this approach of judicial restraint with respect to judicial review of the decisions of the Panel

The *Datafin* and *Guinness* cases were both decided at a time when the London Panel was a non-statutory body administering a non-statutory code of rules. Now that the London Panel is administering a statutory code of rules concerns have been raised that this might precipitate a change of approach by the English courts where the courts would be more willing to intervene and grant judicial review of the operations of a body

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<sup>143</sup> *R v Panel on Takeovers and Mergers, Ex Parte Guinness plc* [1990] 1 Q.B. 146, 158

<sup>144</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin plc* [1987] Q.B. 815, 842

which has full statutory backing than one which simply operates on a consensual approach.<sup>145</sup> The concern is given rise to by the comments of Woolf J in the *Guinness* case where the judge referred to the "unique" qualities of the Panel and seemed to find the absence of statutory obligations important.<sup>146</sup> However, it has been said, and it is submitted rightfully so, that it is less likely that the English courts would change their approach to an application for judicial review by a party to a bid.<sup>147</sup> The court's approach in the *Datafin* case was premised on the special functions of the London Panel, the need to maintain certainty in the market as well as the need to prevent tactical litigation in the course of takeover bids. It is submitted that these considerations underlying the court's approach have not been altered by the simple fact that the London Panel now administers a statutory code of rules. The considerations remain relevant and thus it is submitted that the courts are unlikely to change their approach.

### 3.1.1 Proceedings before London Panel

In chapter 2 it was noted that in South Africa the provisions of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 place limitations on the Panel's ability to enforce the Code by requiring among other things, that parties be accorded the right to legal representation at Panel hearings. It would appear that the London Panel does not suffer from such legislative obstacles. Section 7(c) of the introduction to the London Code provides that, 'At hearings before the Hearings Committee, the case is usually presented in person by the parties, which include the Executive, or their advisers. Although not usual, parties may, if they so wish be represented by legal advisers.' It further provides that proceedings before the London Panel's hearings Committee are informal. Thus legal representation at London Panel hearings appears to be an exception rather than the norm whereas in South Africa legal representation at Panel hearings has become a standard operating procedure due to the requirements of Promotion of

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<sup>145</sup> Christopher Saul 'United Kingdom: UK takeover regulation: no change or sea change?' 2005 Supplement to the *International Financial Law Review* Available at <http://www.iflr.com/?Page=17&ISS=16143&SID=508304> [Accessed on 24 December 2007]

<sup>146</sup> *supra*

<sup>147</sup> *supra*

Administrative Justice Act.<sup>148</sup> In the case of *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch. 591 the Appeal Court in England had to decide whether it was lawful for a body, similar to the London Panel, to stipulate in its rules that its domestic tribunal shall not permit legal representation. The court ruled that such a stipulation was valid. Thus the London Panel, unlike the South African Panel, is not inhibited in its function by a statutory requirement to allow parties to be legally represented at Panel hearings.

The problem with legal representation of parties at Panel hearings is that it leads to delays in the making of rulings and other decisions by the Panel. In the *Enderby Town Football Club Ltd v Football Association Ltd* case cited above Lord Denning said that 'in many cases it may be a good thing for the proceedings to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer.'<sup>149</sup> In the same case Lord Justice Cairns said,

'It is in the interest of justice and not only of administrative convenience that a decision should be arrived at quickly and cheaply. Where the tribunal is composed of intelligent laymen who have a great knowledge of the sport or business concerned, I think that the employment of lawyers is likely to lengthen proceedings and certainly greatly to increase the expense of them without any certainty of bringing about a fairer decision.'<sup>150</sup>

Thus the involvement of lawyers who are steeped in the tradition of court procedures at Panel hearings in South Africa is contrary to the need for speed in the making of decisions by the Panel thereby affecting the integrity of the market and undermining the reason for regulating mergers and takeovers. Perhaps the Panel should reconsider its decision not to apply for an exemption from the application of the provisions of the Promotion of Administrative Justice Act.

To conclude this chapter, since its establishment as a non-statutory self-regulatory body, the London Panel enjoyed a good measure of success in administering and enforcing the London Code. Though it lacked statutory powers to investigate compliance with and to enforce the London Code, it received support from other

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<sup>148</sup> 2005 Securities Regulation Panel Annual Financial Statements. Available at <http://www.srpanel.co.za/Annual%20Report%202005.pdf> [Accessed 13 August 2007]

<sup>149</sup> *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch. 591 at 605. See also A Johnston *The city take-over code* 1ed (1980) 134-135.

<sup>150</sup> *Enderby Town Football Club Ltd v Football Association Ltd* supra at 609

regulatory bodies such as the FSA which strengthened it in its enforcement role. The London Panel also enjoys a good measure of respect and support from the English courts. The courts have taken a pragmatic approach not to undermine the effectiveness of the London Panel and have limited themselves to reviewing decisions of the London Panel in any particular case after the conclusion of a takeover bid. By contrast, the South African Panel which was set up as a statutory regulatory body faces limitations in enforcing the Code. The Panel lacks effective sanctions to enforce the Code and appears not to have the comprehensive support from other regulatory bodies such as that enjoyed by the London Panel. Implementation of the European Union Takeover Directive in the UK has seen the London Panel being vested with power to make statutory rules governing takeovers in the UK as well as power to enforce the London Code through the courts.

## CHAPTER 4

### 4.1 NEW ZEALAND TAKEOVERS PANEL

In this chapter the South African Panel will be compared with the New Zealand Takeovers Panel [the ‘Takeovers Panel’] which administers the Takeovers Code. The discussion will focus on the nature of the Takeovers Panel and its powers as well as effectiveness in enforcing the Takeovers Code. Reference will be made to the Australian Takeovers Panel because the Takeovers Act requires the co-ordination of business law between Australia and New Zealand<sup>151</sup> and also because the Australian takeovers regime provides an interesting concept of a specialist body as an alternative to enforcing takeover codes through the courts.

#### 4.2 Nature of Takeovers Panel

The New Zealand Takeovers Panel is established under s 5 (1) of the New Zealand Takeovers Act 1993 [the ‘Takeovers Act’]. It is, like the South African Panel but unlike the London Panel, a regulatory body with a statutory basis. The Takeovers Panel is charged with, among other things, enforcing the Takeovers Code.<sup>152</sup> Like the Code in South Africa, the Takeovers Code contains rules regulating company takeovers in New Zealand.<sup>153</sup> The Takeovers Code is made by way of an Order in Council as provided for in the Takeovers Act and thus it enjoys statutory force in New Zealand placing it on the same footing as the South African Code.<sup>154</sup> Part III of the Takeovers Act spells out the Takeovers Panel’s powers in enforcing the Takeovers Code. There are similarities and differences between the Takeovers Panel’s enforcement powers and those enjoyed by the Panel in South Africa as discussed below.

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<sup>151</sup> Section 24 of the Takeovers Act 1993

<sup>152</sup> Section 31 of the Takeovers Act 1993.

<sup>153</sup> See sections 19 and 20 of the Takeovers Act 1993.

<sup>154</sup> Section 19 (1) of the Takeovers Act 1993.



### **4.3 Investigative Powers**

Like any other regulatory body, the Takeovers Panel has to be able to monitor compliance with the Takeovers Code in order for it to identify breaches of the same. Section 31A (1) (a) of the Takeovers Act empowers the Takeovers Panel to require any person to produce for inspection any document kept by that person. The Act also empowers the Panel to receive evidence as well to summon witnesses and take evidence from such witnesses under oath.<sup>155</sup> It is an offence under s31F of the Takeovers Act for a person to refuse to produce a document when required to do so by the Takeovers Panel. The powers of investigation vested in the Takeovers Panel under the Takeovers Act are akin to the Panel's powers under s440D of the South African Companies Act. The powers equip the Takeover Panel to effectively monitor compliance with the Takeovers Code.

### **4.4 Enforcement Sanctions**

#### **4.4.1 Written undertakings**

While the South African Panel can employ a private or a public reprimand as sanctions to enforce compliance with the Code, it would appear that the Takeovers Panel does not have the power to issue such reprimands. However, unlike the South African Panel, the Takeovers Panel has express statutory authority to accept written undertakings given by, or on behalf of, a person in connection with a matter in relation to which the Takeover Panel is exercising any of its powers or performing any of its functions under the Takeovers Act.<sup>156</sup> Presumably, the written undertaking is made by a party as result of some form of engagement or discourse between the party making the undertaking and the Takeovers Panel. It would appear that such undertakings would include undertakings to comply with the Takeovers Code since enforcing compliance with the Takeovers Code is a matter in relation to which the Takeovers Panel may exercise power under the Act. Although the South African Panel lacks express statutory authority to accept written undertakings, there is no reason why it would not accept and implement such an undertaking when given by a party.

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<sup>155</sup> Sections 31L to 31N of the Takeovers Act 1993

<sup>156</sup> Section 31T (1) of the Takeovers Act 2003.

The written undertakings referred to above are enforceable by the Takeovers Panel under s31U of the Takeovers Panel. In terms of that section, if a party breaches a term of its undertaking, the Takeovers Panel may apply to the court for an order directing the person to, among other things, comply with that term or an order directing the person to pay to the government an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach. In accordance with the general principles of the law of contract in South Africa relating to offer and acceptance, it would appear that a legally enforceable contract is created where an undertaking is given by a party and accepted by the Panel.<sup>157</sup> Therefore the Panel could enforce such a contract in a court of law should the party who made the undertaking fail to abide by the terms of the undertaking.

The acceptance and enforcement of written undertakings is one method employed by the Takeovers Panel in enforcing the Takeovers Code as discussed above. The effectiveness of this method of enforcing the Takeovers Code is dependant upon the willingness of parties to make an undertaking in the first place; much like the effectiveness of a private or public reprimand is dependant upon the value placed on its public image by a party that is the subject of the reprimand. However, the strength of the written undertaking lies in the fact that once made; it is enforceable and can only be withdrawn or varied with the consent of the Takeovers Panel.<sup>158</sup> It is submitted that there is not much to be gained in following the New Zealand example by enacting an express statutory provision providing for the giving and acceptance of written undertakings. In terms of the general rules of South African law of contract, the acceptance of an offer creates a legally binding contract as noted above.<sup>159</sup> Therefore the giving and acceptance of a written undertaking creates a legally binding and enforceable contract between the Panel and the party making the undertaking without more.

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<sup>157</sup> With regards to offer and acceptance see RH Christie *The law of contract in South Africa* 3ed (1996) 28

<sup>158</sup> Section 31T (2) of the Takeovers Act 2003.

<sup>159</sup> RH Christie *supra* note 156.

#### **4.4.2 Power to Make Determinations, Restraining Orders and Compliance Orders**

Where the South African Panel's effectiveness in enforcing the Code is inhibited by a lack of clarity as to its power to make rulings on the provisions of the Code, the Takeovers Panel's effectiveness has been enhanced by the clear articulation of its powers. The Takeovers Act provides that where the Takeovers Panel considers that a person may not have acted or may not be acting or may intend not to act in compliance with the Takeovers Code it may hold a meeting to determine whether it should exercise any of its powers under the Takeovers Act.<sup>160</sup> Following such a meeting the Takeovers Panel has the power to make a determination that it is satisfied that the person in question has complied or has not complied with the Takeovers Code.<sup>161</sup>

In addition to having the power to make determinations the Takeovers Panel is also empowered to make temporary restraining orders. Section 32 (4) (a) of the Takeovers Act states that where the Takeovers Panel makes a determination that there has been non-compliance with the Takeovers Code, it may make a temporary restraining order relating to the non-compliance with the Takeovers Code. Similarly, the Takeovers Panel's power to make permanent compliance orders is spelled out in s32 (4) (c) of the Act. This clear statement in the Takeovers Act of the Takeovers Panel's powers to make these various orders differentiates it from the South African Panel whose power to make rulings on the provisions of the Code is not expressly provided for in the Companies Act.

Not only are the Takeovers Panel's powers expressly provided for in the Takeovers Act, the powers are also backed up by the force of criminal sanctions. For instance, s44 (5) as read with s44 (4) of the Takeovers Act makes it a criminal offence to act in contravention of an order made by the Takeovers Panel in terms of s32. The offence attracts a fine not exceeding NZ\$300,000 and, if the offence is a continuing one, a further fine not exceeding NZ\$10,000 for every day or part of a day during which the offence is committed.<sup>162</sup> The Takeovers Panel's ability to procure criminal sanctions against parties that do not comply with its orders stands in contrast to the South African

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<sup>160</sup> Section 31 (1) of the Takeovers Act 1993.

<sup>161</sup> Section 32 (3) of the Takeovers Act 1993

<sup>162</sup> Section 44 (5) of the Takeovers Act 1993

Panel's lack of power to procure criminal sanctions against non-compliant parties. It is submitted that backing the Takeovers Panel with criminal sanctions strengthens it in its enforcement role because parties are unlikely to ignore its orders for fear of being prosecuted and fined. A clear statement of the Panel's powers in the South African Companies Act backed with criminal sanctions would, it is submitted, enhance the Panel's effectiveness in enforcing the Code.

#### **4.4.3 Enforcement by the Courts**

The New Zealand Takeovers Code, like the South African Code, is enforceable through the courts in terms of s35 of the Takeovers Act. However, the procedure of enforcing the Takeovers Code through the courts in New Zealand has a distinctive feature in that the Takeovers Panel is not the only body empowered to enforce the Takeovers Code in that manner. Various other persons are also authorised to enforce the Takeovers Code through the courts under s35 (3) of the Takeovers Act. The section provides that where the Takeovers Panel has made a determination that it is not satisfied that a person has complied with the Takeovers Code the following persons may make an application to court to enforce the Takeovers Code; 'the Panel, the registered exchange where the specified company's securities were registered on that exchange at the material time a member or security holder of the specified company concerned...or, with the leave of the court any other person.' This feature distinguishes the New Zealand procedure from the procedure provided for under s440M of the South African Companies Act where only the Panel can enforce the Code through the Courts.

At first blush the possibility that various persons, besides the Takeovers Panel, can apply to court to enforce the Takeovers Code appears to open the floodgates for multiple, and possibly tactical, court actions designed to stymie a takeover bid. However, the rights of other persons other than the Takeovers Panel to bring a court application for an order to enforce compliance with the Takeovers Code are limited by s35 of the Takeovers Act. In terms of that section there are only two circumstances in which persons other than the Takeovers Panel are entitled to make an application court. The first is where the Panel, after making a determination under s32 (3) (b), has

consented to the making of the application or the Panel has not applied itself within 10 days of being asked in writing to do so.<sup>163</sup> Section 32(3) (b) provides for a determination that the Panel is not satisfied that the Code has been or is being complied with. The second is where the Panel failed to make a determination under s32 (3) within 14 days of receiving a request to hold a meeting under s32 (1).<sup>164</sup> The effect of these provisions is that the aggrieved party must always seek recourse from the Panel before invoking the Court's jurisdiction under s34, and it cannot apply to the Court at all if the Panel is satisfied with respect to compliance.<sup>165</sup> The provisions ensure that those opposed to a particular takeover are not able to use the Code and the litigation process to derail a takeover and subvert the true purpose of the Takeovers Code.<sup>166</sup>

It would appear that in New Zealand, the court's jurisdiction to make remedial orders in takeover disputes is far more extensive than that of the Takeovers Panel.<sup>167</sup> The court has great power to order a wide range of remedies to enforce the Takeover Code during the course of a takeover. For instance; the Court may grant an interdict restraining a person from engaging in conduct that constitutes or would constitute a contravention of the Takeovers Code; it may make a civil remedy orders such as cancellation or forfeiture of securities in question and it may also make compensatory orders upon application by the Panel.<sup>168</sup> Upon application by the Panel the Court may also make pecuniary penalty orders and declarations of contravention.<sup>169</sup> The pecuniary penalties provided for under the Act are substantial; a person who breaches the Code or is party to a breach may be ordered to pay a fine of up to \$500,000 in the case of a person or \$5 million in the case of a body corporate.<sup>170</sup> The possibility of procuring a pecuniary penalty against a non compliant party strengthens the Takeovers Panel in its enforcement role. By contrast the South African Panel's lack of power to procure

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<sup>163</sup> s35 (2) (a) and (b).

<sup>164</sup> s35 (3).

<sup>165</sup> *Takeovers Panel v Deleat's Wine Estate Limited and Another*, Unreported New Zealand High Court, Wellington CIV-2005-485-2058 page 5 paragraph 14. An electronic copy of the judgment was requested and obtained from the New Zealand Takeovers Panel for this research paper

<sup>166</sup> Takeovers Panel *Briefing paper to minister of commerce* (2005) Available at <http://www.takeovers.govt.nz/publications/bim-05/bim-05.pdf> [Accessed 4 January 2008]

<sup>167</sup> *Takeovers Panel v Deleat's Wine Estate Limited and Another*, Unreported New Zealand High Court, Wellington CIV-2005-485-2058 page 5 paragraph 13.

<sup>168</sup> ss 33F, 33I and 33K of the Takeovers Act 1993.

<sup>169</sup> s 33M of the Takeovers Act

<sup>170</sup> s 33P of the Takeovers Act.

pecuniary penalties against non compliant parties weakens its position as enforcer of the Code.

It is also interesting to note that once the court's jurisdiction under the Takeovers Act has been invoked in relation to any takeover dispute, the court is not constrained by any previous Takeovers Panel inquiry under s32 of the Takeovers Act.<sup>171</sup> That is, the court is not bound by any prior determination made by the Takeovers Panel as to whether there has been compliance or non compliance with the Takeovers Code. Thus the court will hear the matter afresh and come to its own conclusions. This approach is similar to the way in which the courts would treat a Panel application under section 440M of the South African Companies Act where, as noted earlier, the court will hear the matter de novo. Such an approach tends to undermine the role of a takeovers panel as enforcer of the takeover code. Another concern with the New Zealand procedure is that where the Takeovers Panel applies to the court for an order enforcing the Takeover Code, the Panel's application takes the form of an ordinary proceeding, which has to be set down for trial.<sup>172</sup> Consequently a timetable would have to be set for the exchange of briefs, discovery of documents and other interlocutory matters followed by the trial.<sup>173</sup> It is submitted that court trial procedure does not accord with the need for speed such as is called for in takeover matters. Thus the involvement of the New Zealand courts in this fashion in takeover matters may disrupt the running of a takeover bid process undermining the Takeovers Panel's role as enforcer of the Takeovers Code.

#### 4.5 Review by the Courts

Section 32V (1) of the Takeovers Act places limitations on the Takeovers Panel's ability to enforce the Takeovers Code similar to the limitations placed upon the South African Panel by the provisions of the Promotion of Administrative Justice Act 2003. In terms of s32V (1), the Takeovers Panel must allow a person to be heard and to be represented at meetings called to determine compliance with the Takeovers Code. Thus unlike the case with the London Panel, legal representation is the norm rather than the exception at

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<sup>171</sup> *Takeovers Panel v Deleat's Wine Estate Limited and Another*, Unreported New Zealand High Court, Wellington CIV-2005-485-2058 page 6 paragraph 15

<sup>172</sup> *Takeovers Panel v Deleat's Wine Estate Limited and Another*, Unreported New Zealand High Court, Wellington CIV-2005-485-2058 page 7 paragraph 19

<sup>173</sup> *supra*

Takeovers Panel hearings. The risk attendant on allowing legal representation at proceedings before a Takeovers Panel is that it impacts negatively on the Panel's ability to make decisions quickly whereas speed in decision making is essential in takeovers.

Apart from the provisions of s 32V (1), the Takeovers Panel is also obligated to comply with the principles of natural justice in the exercise of its functions and powers under the Takeovers Act.<sup>174</sup> Consequent to this requirement, there is scope for a determination of the Takeovers Panel to be subject to judicial review.<sup>175</sup> In the UK the *Datafin* case laid down the approach of the courts in relation to review of the London Panel decisions; the courts limit themselves to intervening after the conclusion of a takeover bid. It would appear that the judicial review procedure provided for under New Zealand's Judicature Amendment Act 1972 does not embrace the *Datafin* principle of judicial restraint in relation to the review of the Takeovers Panel's decisions.

In the case of *Delegat's Wine Estate Limited v Takeovers Panel* – the first ever New Zealand High Court review of the Takeovers Panel's decision - Delegat's brought judicial review proceedings in terms of the Judicature Amendment Act 1972 during the course of a takeover bid challenging the Takeovers Panel's jurisdiction to make restraining orders in the circumstances of that case.<sup>176</sup> In dismissing the application for review, the court made no reference to any principle of judicial restraint in relation to the review of the Takeovers Panel's decisions such as was enunciated in the *Datafin* case. Therefore, it would seem that the courts in New Zealand have a free hand to review decisions of the Takeovers Panel at any time, even during the course of a takeover bid.

If the view discussed above is correct, it is submitted that in the context of takeovers, a process of judicial review without limits may lead to the disruption of the running of a takeover timetable and may result in the frustration of takeover bids. It also brings in an element of uncertainty in the market since participants would not be able rely on a Takeovers Panel decision in respect of which an application for review is

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<sup>174</sup> Section 8 (2) of the Takeovers Act.

<sup>175</sup> *Morison's company and securities law* Vol 2 (2003) page 45.14

<sup>176</sup> *Delegat's Wine Estate Limited v Takeovers Panel* Unreported New Zealand High Court, Wellington CIV-2005-485-2047 An electronic copy of the judgment was requested and obtained from the New Zealand Takeovers Panel for this research paper.

pending. Thus the judicial review procedure has the potential to undermine the integrity of the market in New Zealand. Further, as is the case in South Africa, the judicial review process in New Zealand is also susceptible to abuse by parties who may seek to thwart takeover bids by making tactical applications for judicial review.

The New Zealand approach of allowing courts to play a significant role in resolving takeover disputes in New Zealand raises the question whether it is desirable for courts to play such a prominent role given the potential for delays inherent in court processes. The approach contrasts sharply with the minimal role played by the courts in Australia in spite of the fact the New Zealand Takeovers Act requires the co-ordination of business law between Australia and New Zealand.<sup>177</sup> The Australian approach brings in an interesting dimension to the extent that it minimises the role of the courts and introduces the concept of a specialist body as the primary forum for resolving takeover disputes during the course of a takeover bid. It merits discussion because it provides an alternative to the New Zealand and South African approaches of enforcing their respective takeover codes through the courts. However, the discussion will not go into great detail concerning the Australian Panel's enforcement powers and procedures; rather, it will focus more on the nature of that panel as a specialist body.

The Australian Takeovers Panel is a statutory body established by section 171 of the Australian Securities and Investments Commission Act 1989 and continued in existence by section 261 of Australian Securities and Investments Commission Act 2001. As originally established the Australian Takeovers Panel's purpose was to enforce the spirit of the takeover provisions.<sup>178</sup> The Panel was vested with the power to make unacceptable conduct declarations in relation to takeovers.<sup>179</sup> It would appear that the Australian Securities and Investments Board, which was the only body that could refer matters to the Australian Takeovers Panel, rarely used the services of the Panel and most parties in takeover disputes had to resort to the courts for resolution of their disputes.<sup>180</sup>

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<sup>177</sup> Section 24 of the Takeovers Act 1993

<sup>178</sup> Emma Armson 'Models for takeover dispute resolution: Australia and the UK' (2005) 5 *Journal of Corporate Law Studies* 401 at 407

<sup>179</sup> R Tomasic, S Bottomley and R McQueen *Corporations Law in Australia* 2ed (2002) 719

<sup>180</sup> Nicole E Calleja *The new takeovers panel-a better way?* 1ed (2002) 5



This eventually led to calls for a better venue to ‘resolve time-sensitive commercial issues than the traditional court system.’<sup>181</sup>

In 1999 the Australian legislature enacted the Corporate Law Economic Reform Program Act 1999 [the ‘CLERP Act’] which ‘significantly increased the powers of the Australian Takeovers Panel in the takeovers process, and by doing so, downgraded the role of the courts in dealing with takeover disputes.’<sup>182</sup> The reform proposals that culminated in the CLERP Act cited the advantages of a Panel with increased powers as follows; ‘specialist expertise, with representation from industry as well as specialist lawyers; speed, informality and uniformity in decision making; the minimisation of tactical litigation; and the freeing up of court resources to attend to other priorities.’<sup>183</sup> In pursuing the objective of injecting specialist expertise in the Takeover Panel the Australian Government appointed forty-eight part-time members of the Panel most of whom work in the fields of law, banking and company management.<sup>184</sup>

With respect to the objective of minimizing tactical litigation, the rights of parties to commence court proceedings in relation to a takeover bid while the bid is still in progress were taken away by section 659B of the Corporations Act 2001; only the Australian Securities and Investments Commission [the ASIC] can commence court proceedings before the end of the bid period. Meanwhile, section 659C (1) of the Act limited the orders that a court could make after the bid period; in the event of a breach of the Corporations Act and where the Takeover Panel refuses to make a declaration of unacceptable circumstances, the only kind of remedial order that the court may make is one that requires the offender to pay money to another person.<sup>185</sup> The aim of these provisions was to effectively make the Australian Takeover Panel the main forum for resolving disputes about a takeover bid until the bid period has ended.<sup>186</sup> The panel was

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<sup>181</sup> Bill Pheasant cited in Calleja (above) at 12.

<sup>182</sup> R Tomasic, S Bottomley and R McQueen *Corporations Law in Australia* 2ed (2002) 719

<sup>183</sup> ‘Corporate control: a better environment for productive investment’ *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 32. Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>184</sup> Emma Armson ‘The Australian takeovers panel and judicial review of its decisions’ (2005) 26 *Adelaide law Review* 327 at 332-331.

<sup>185</sup> Section 695C (2) of the Corporations Act 2001

<sup>186</sup> Section 659AA of the Corporations Act 2001

also given new review powers that empowered it to affirm, vary or set aside a decision of the ASIC.<sup>187</sup>

Thus the CLERP reforms downgraded the role of the courts in resolving takeover disputes and increased the Australian Takeover Panel's Powers so as to make it the primary forum for the resolution of takeover disputes during the course of a takeover bid. The Australian approach is interesting for its deliberate attempt to curtail the jurisdiction of the courts. The approach was born out of a perception that the ready availability of litigation as a tactical defence leads to the courts being used for tactical purposes.<sup>188</sup>

Another interesting feature of the Australian approach is the preference of a specialist body - the Australian Takeovers Panel - largely comprised of experts in the field, as the body most suited to resolve takeover disputes during the course of takeover bids. A specialist body was favoured because it could resolve takeover disputes quickly and efficiently on the basis of their commercial merits.<sup>189</sup> It is submitted that this approach provides an alternative and better approach to the current South African system where there is a possibility that takeover disputes may end up in court either through the Panel seeking to enforce its rulings or by way of an application for a judicial review of a Panel decision. This possibility leaves scope for tactical litigation and may also lead to the frustration of takeover bids. South Africa can learn from the Australian Takeovers Panel which has been widely acknowledged as an effective dispute resolution forum, bringing speed, specialist expertise and commercial pragmatism to the regulation of takeovers.<sup>190</sup> Further, the Australian Takeovers Panel is generally considered a success; the Australian courts respect its jurisdiction and it has earned a position of respect in the business community.<sup>191</sup>

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<sup>187</sup> Sections 656A (1) and (3) of the Corporations Act.

<sup>188</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 37 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>189</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 37 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>190</sup> Rowen Cross, 'The takeovers panel three years on: should we ever go back to the courts?' (2003) 21 *Company and Securities Law Journal* 367

<sup>191</sup> Walsh, E 'Judging the takeovers panel' (2002) 20 *Company and Securities Law Journal* 435 at 441.

One fundamental question that would arise in considering the establishment of a specialist body with exclusive jurisdiction to resolve takeover disputes in South Africa relates to the status to be accorded to such a specialist body. There are at least two possible options. The first is to establish it just as a specialist (commercial) body that has exclusive jurisdiction to deal with takeover disputes during the course of a takeover bid – that is more like the Australian Panel. The second is to set it up as a specialist court (a commercial court) with exclusive jurisdiction to deal with takeover disputes. Under the CLERP reform proposals the idea of establishing a specialist court was mooted but rejected because of the potential cost and the desirability of giving the dispute resolution forum a commercial rather than a legal focus.<sup>192</sup> Thus the CLERP reforms opted for a specialist body.

The advantage of a specialist body is that its procedures can be designed in such a manner as to enable the body to conduct its proceedings informally while providing parties with an expeditious but fair hearing of their matter.<sup>193</sup> A specialist body avoids the excessive legalism in proceedings that is characteristic of formal court procedures. However, given that such a body would be involved in resolving takeover disputes and thus will necessarily grapple with legal issues, for instance deciding whether takeover regulations have been breached, care should be taken to ensure that the specialist body's functions will not usurp the role of the courts as this may lead to the powers of the body being challenged for contravening s165(1) of the Constitution of the Republic of South Africa Act 108 of 1996 which vests judicial authority of the republic in the courts. At some point the powers of Australian Takeovers Panel, though set up as a specialist body, were successfully challenged in court on the grounds that the Panel was exercising judicial authority contrary to the Australian constitution.<sup>194</sup>

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<sup>192</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 37 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>193</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 37 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>194</sup> *Australian Pipeline Limited v Alinta Limited* (2007) 25 ACLC 602. The Federal Court's decision in this case has since been reversed by the Australian High Court, see Australian High Court press release Available at [http://www.hcourt.gov.au/media/Attorney-General\\_of\\_the\\_Commonwealth\\_v\\_Alinta%20\\_orders.pdf](http://www.hcourt.gov.au/media/Attorney-General_of_the_Commonwealth_v_Alinta%20_orders.pdf) [Accessed 12 January 2008]

Though the idea of a specialist court was rejected in Australia, it is not an impracticable one, a precedent already exists in South Africa in the form of the Competition Tribunal and the Competition Appeal Court established under the Competition Act 1998 to deal with competition issues in the context of mergers and takeovers. Establishing the specialist body as a court would at once strengthen the body's enforcement abilities because, for instance, its rulings will have binding effect and the court will have power to impose effective sanctions such as fines or criminal sanctions – something the existing Panel is badly in need of.

One limitation of setting up the specialist body as a court is the question of cost. The jurisdiction of a specialised commercial court is likely to extend beyond takeover disputes to cover matters arising under the Companies Act and thus the court would preside over a large number of cases. To be effective such a court would require a greater allocation of resources in terms of funding and staffing than would be required for a specialist body that deals with takeover disputes only. Another drawback of a specialist court is that the decisions of the specialist court would not only be subject to review by a superior court, they would also be subject to appeal through the South African court hierarchy all the way to the Constitutional Court leading to delays in the resolution of takeover matters. Further, a specialist body would be able to give market participants guidance as to whether a proposed course of conduct would be in breach of the Code.<sup>195</sup> On the other hand a specialist court would not be able to advise parties before a dispute arises. Thus in deciding whether to set up a specialist body or a specialist court the pros and cons of each approach would have to be weighed.

Before concluding this chapter an important point has to be made concerning the specialist body that is the Takeovers Panel in Australia. Though the jurisdiction of the Australian courts has been downgraded in favour of the Takeovers Panel in relation to the resolution of takeover disputes, the decisions of the Australian Panel are still subject to judicial review. The courts can review the decisions of the panel under the Administrative Decisions (Judicial Review) Act 1977 and the High Court's jurisdiction

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<sup>195</sup> See Section A: Introduction of the Code 2(c) where parties can consult with the Panel in advance. In this regard see also Rowen Cross, 'The takeovers panel three years on: should we ever go back to the courts?' (2003) 21 *Company and Securities Law Journal* 367 at 387.

under section 75(v) of the Australian constitution.<sup>196</sup> As is the case with the judicial review of the decisions of the South African Panel, it has been said of the judicial review procedure in Australia that it has the potential to disrupt the takeover process and the delay occasioned by a review could thwart a takeover bid.<sup>197</sup> This has led some scholars to advocate the adoption of the approach of the English courts in relation to the review of the London Panel's decisions as laid down in the *Datafin* case.<sup>198</sup>

Thus the possibility of judicial review of the Takeovers Panel's decisions works against the objective of the CLERP reforms to minimise tactical litigation. However, despite this shortcoming, the Australian approach is still important for the lessons it holds for South Africa in relation to the establishment of a specialist body with exclusive jurisdiction to deal with takeover disputes during the course of a takeover bid. The problems posed by the judicial review procedure could be circumvented by adopting the *Datafin* approach in relation to the review of the specialist body's decisions.

In conclusion, the New Zealand Takeovers Panel is a statutory body like the South African Panel. Like its South African counterpart, it enforces the Takeovers Code through the courts. When the Takeovers Panel applies for a court order, the courts in New Zealand have a wide ranging jurisdiction in enforcing the Takeovers Code. By contrast, the jurisdiction of Australian courts to resolve a takeover dispute during the course of a takeover bid has been substantially downgraded. The Australian Takeovers Panel – a specialist body – is the primary forum for resolving a takeover dispute during the course of a takeover bid. South Africa can learn from the Australian experience and introduce either a specialist body or a specialist commercial court with exclusive jurisdiction to resolve takeover disputes during the course of takeover bids. Establishment of such a body minimises the risk of tactical litigation which is associated with the procedure of enforcing the Code through the courts.

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<sup>196</sup> Emma Armson 'The Australian takeovers panel and judicial review of its decisions' (2005) 26 (2) *Adelaide law Review* 327 at 334

<sup>197</sup> *supra* at 331.

<sup>198</sup> *Supra* at 357

## CHAPTER 5

### 5.1 RECOMMENDATIONS

The preceding chapters discussed the factors limiting the Panel's ability to enforce the Securities Regulation Code. A comparative analysis of the Panel and the London Panel in the UK as well the Takeovers Panel in New Zealand, and to some extent the Australian Takeovers Panel, highlighted the areas where improvements could be made in the Panel's enforcement of the Code. In this concluding chapter recommendations are made as to how Panel's ability to enforce the Code could be enhanced. The recommendations take into account proposed amendments to the Companies Act contained in the Companies Amendment Bill 2007.

#### 5.2 Financing of the Panel

Funding available to the Panel under the existing funding structure is inadequate to meet the Panel's operating needs. Some changes are needed to ensure adequate financing for the Panel. Legislative changes proposed under the Companies Amendment Bill 2007 [the Bill] will see the Panel reconstituted as the Takeover Regulation Panel [the TRP] under section 197 (1) of the Bill. Section 211 (1) of the Bill provides that the TRP will be financed from money appropriated by Parliament; any fees payable in terms of the Act; income derived from the TRP's investment and deposit of surplus money and other money accruing from any source.

The proposed changes relating to the Panel's financing constitute a major shift from the existing legal position. First, under the existing legal regime section 440C (4) (a) as read with section 440E of the Companies Act empower the Panel to make rules providing for the administration and financing of the Panel. Details of how the Panel is funded are then laid out in the rules made by the Panel.<sup>199</sup> It would appear that in terms of section 111(b) of the Bill, the power to make rules providing for the administration, operation and procedures of the TRP or any other matter relating to the powers and

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<sup>199</sup> See Rules 2.1 and 2.2 of the Administrative Rules in the Code.

functions of the TRP will now be vested in the Minister responsible for companies as opposed to the Panel as is currently the case. At the same time, details of how the TRP is to be funded will no longer be laid out in the rules made by the Panel, rather they are provided for directly in the Act under section 211(1). Second, the Bill brings in a major change in the funding structure of the Panel in that the TRP will be funded from public funds whereas currently the Panel receives no public funding. Further, it would appear that the Bill does away with the Panel's primary sources of financing namely, fees for services and the fee based on a percentage of the annual listing fees and initial listing fees charged by the JSE to listed companies currently provided for in Rules 2.2 and 2.1 of the Administrative rules of the Code. Although section 211(1) (b) of the Bill makes reference to 'any fees payable in terms of the Act,' there appears to be no other provision in the Bill providing for the payment of any such fees and thus it is unclear what the fees referred to in the Bill are.

It is commendable that the legislature proposes to finance the TRP from money appropriated by Parliament. The change provides a new source of funding which may improve the Panel's financial position. Financing a regulatory body such as the Panel from public funds is not an unusual arrangement because similar regulatory bodies such as the New Zealand Takeovers Panel are partly funded from public funds.<sup>200</sup> However, the Bill is not clear how much of the TRP's funding needs will be funded from the public purse.

The existing funding structure, though inadequate, has managed to keep the Panel afloat since its establishment. Therefore, there is no need to discard it as a whole, but to improve and supplement it. It is recommended that in addition to public funding, the TRP's funding structure should reflect a balance between those parties directly involved in takeover activity and market participants. That is, those directly involved in takeovers as well as other investors should bear part of the burden of financing the Panel. Accordingly, it is recommended that the legislature should not completely do away with the existing funding structure that levies fees on listed companies as well as fees based on the value of takeover deals. It is further recommended that the existing

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<sup>200</sup> Sources of Funding in Takeovers Panel Annual Report 2006 Available at <http://www.takeovers.govt.nz/publications/ann-rep-06/02.htm> [Accessed 13 August 2007]

funding structure be improved by the addition of a fee similar to the London panel's PTM fee which is levied on specified transactions in securities on specified markets.<sup>201</sup> For example, the fee could be levied on investors when they buy or sell securities of a specified amount on either the JSE's main board or the JSE's alternative exchange (AltX). It is also recommended that the existing funding structure be improved by the introduction of the concept of exempt status fees similar to the exempt charges provided for in section 13 of the London Code. As discussed in chapter one, the concept of exempt status will result in additional revenue to the Panel. It could also, in certain cases, result in cost savings by obviating the need to investigate what investment mandates asset/fund managers hold in any given case in order to determine whether or not they acted in concert.

To avoid straining the public budget, it is recommended that the TRP's funding from the public purse be limited to its baseline funding needs. That is, the TRP should be allowed access to public funds only to the extent that fees from other sources are insufficient to meet its operating needs. It is hoped that enhancing the existing funding structure as recommended above and supplementing it with limited public funding would improve the Panel's finances, thereby enhancing its ability to enforce the Code, without placing a heavy burden on the public budget.

### **5.3 Power to Make Rulings and Orders**

The South African Companies Act does not expressly empower the Panel to make rulings and decisions on the provisions of the Code neither does it specify the status of the Panel's rulings.<sup>202</sup> This situation is undesirable as it leaves scope for parties to challenge the Panel's powers in court thereby opening the door for tactical litigation. The Panel's powers to make rulings and decisions on the provisions of the Code should be expressly provided for in the Act.

Section 111 of the Companies Bill 2007 appears to replace the Securities Regulation Code with the Takeover Regulations that are to be made by the Minister in consultation

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<sup>201</sup> Fees and Charges Available at <http://www.thetakeoverpanel.org.uk/new/> [Accessed 11 August 2007]

<sup>202</sup> Blackman, Jooste and Everingham *Companies Act III* (2002) 15A-45



with the TRP. Therefore there can be no question of the Panel interpreting the provisions of the Code under the Bill. However, the Bill does not specify who will be responsible for interpreting the provisions of the Takeover Regulations. It is inevitable that someone will have to give an authoritative interpretation of the Takeover Regulations. The Bill provides that the TRP will be responsible for regulating affected transactions in accordance with the Takeover Regulations and to consult with the Minister in respect of additions, deletions and amendments to the regulations.<sup>203</sup> It also provides that the TRP may consult with any person at the request of any interested party with a view to advising on the application of a provision of...the Takeover Regulations.<sup>204</sup> In the light of this it would appear that the duty to interpret the provisions of the Takeover Regulations would fall to the TRP.

To avoid any doubts about the TRP's powers to interpret the provisions of the Takeover Regulations and to minimize the risk of tactical litigation, it is recommended that the TRP's powers to make rulings on the provisions of the Takeover Regulations be expressly provided for in the Companies Act along the lines of s 945(1) of the UK Companies Act 2006. This could be done by adding a section 202 (2A) (a) to the Bill that would provide that, 'The TRP may make rulings on the interpretation, application or effect of the Takeover Regulations.' It is further recommended that a section 202 (2A) (b) be added in the Bill to spell out the status of the TRP's rulings in these terms; 'To the extent and in the circumstances specified in the regulations, and subject to any review or appeal, a ruling has binding effect.'

It is commendable that section 172 of the Bill expressly empowers the Takeovers Special Committee to issue compliance notices against any person whom, on reasonable grounds, it believes has contravened the Act. Adding the sections recommended above would remove further doubts about the Panel/TRP's power to make rulings on the provisions of the Takeover Regulations.

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<sup>203</sup> 2007 Companies Bill Section 202 (1) (a) and (c)

<sup>204</sup> Section 202 (2) (a) of the Bill.

## 5.4 Penal Powers

It is an undesirable situation that the Panel lacks power to discipline parties who fail to comply with its rulings. The Panel should be empowered to impose fines or criminal sanctions on non-compliant parties. It is encouraging to note that under the 2007 Companies Bill the TRP will have power to procure a fine or criminal sanctions against a person who fails to comply with a compliance notice issued by the Takeover Special Committee.<sup>205</sup> Section 172(7) of the Companies Bill 2007 empowers the TRP to apply to court for the imposition of administrative fine or the prosecution of any person who fails to comply with a compliance notice. The administrative penalty that the Court may impose in this event should not exceed the greater of 10% of the concerned party's annual turnover or R 1 000 000 as per section 176(1) (b) of the Bill.

It is submitted that these sanctions are in accord with the qualities of regulatory sanctions; they clearly demonstrate that non-compliance will not be tolerated and that there will be a reprimand or consequence that will put the violator in a worse position than those entities that comply with their regulatory obligations on time.<sup>206</sup> The only complaint is that Panel has to apply to court for the fine to be imposed; it is submitted that this requirement is unnecessarily bureaucratic. The TRP should be vested with power to impose the fine on its own without having to go to court. If the TRP has power to make binding rulings, failure to comply with such rulings should be treated similar to a contempt of court.

## 5.5 Specialist Body

Mergers and Takeovers involve intricate commercial matters that need to be resolved speedily to maintain the integrity of the markets. Involvement of standard civil courts with their formal rules of procedure in resolving takeover disputes leaves scope for

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<sup>205</sup> Section 172 (7) of the Companies Bill 2007. Available at [http://www.thedti.gov.za/ccrdlawreview/part3companyBill224\\_376.pdf](http://www.thedti.gov.za/ccrdlawreview/part3companyBill224_376.pdf) [Accessed 19 November 2007]

<sup>206</sup> Richard B. Macrory *Regulatory justice: making sanctions effective*. Final Report to the UK Cabinet Office (2006). Available at [http://bre.berr.gov.uk/regulation/documents/pdf/macrory\\_penalties.pdf](http://bre.berr.gov.uk/regulation/documents/pdf/macrory_penalties.pdf) [Accessed 22 November 2007]

tactical litigation designed to frustrate hostile takeover bids.<sup>207</sup> To minimize the risk of tactical litigation the role of the courts in resolving takeover disputes during the course of a takeover bid should be limited.

It is recommended that a specialist body with exclusive jurisdiction to resolve takeover disputes during the course of takeover bids be established. The specialist body could take one of two forms. It could be set up as a specialist court or it could just be a specialist (commercial) body with exclusive jurisdiction to resolve takeover disputes during the course of a takeover. A specialist body as opposed to a specialist court is recommended because, as a dispute resolution forum, it would be able to maintain a commercial rather than legal focus;<sup>208</sup> takeover disputes largely involve commercial considerations though legal issues also arise. Further, the absence of formal court rules in the processes of a specialist body ensures that decisions are made expeditiously and informally taking into account commercial considerations.<sup>209</sup> To ensure speed and informality in the proceedings of the specialist body it is recommended that the original intent of the current Panel to exclude legal representation at Panel hearings be adopted. In this respect it is recommended that the specialist body should seek an exemption from the application of the provisions of the Promotion of Administrative Justice Act No 3 of 2000 as provided for under that act.<sup>210</sup>

The specialist body would be comprised of experts from the South African business community. Specific details of how the specialist body would fit in the existing takeover regime are beyond the scope of this paper. However, it is envisaged that the Australian Takeovers regime would provide a blueprint for how the system should be set up. The existing Panel would be reconstituted as the equivalent of the Australian Securities Investments Commission (ASIC) while the proposed specialist body would be

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<sup>207</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 37 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>208</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 32 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>209</sup> Corporate control: a better environment for productive investment *Corporate Law Economic Reform Program Proposals for reform: Paper No. 4* (1997) 32 Available at <http://www.treasury.gov.au/documents/284/PDF/full.pdf> [Accessed 7 January 2008]

<sup>210</sup> ss 2 (1) (a) and (b) of the Promotion of Administrative Justice Act No. 3 of 2000

the equivalent of the Australian Takeovers Panel. The powers and functions of the existing Panel would have to be revised in the context of the new structure. The specialist body would then be invested with the necessary powers to enable it to perform its functions as the primary forum for the resolution of takeover dispute. It is assumed that since South Africa has already opted for a statutory body, the Panel, to regulate takeovers the specialist body would also be a statutory body.

A specialist court, though recommended, is not favoured for reasons cited in the previous chapter namely; it may be costly, decisions of the specialist court would be subject to appeal through the hierarchy of the court system which may lead to delays and special procedures unique to the specialist court would need to be designed for expeditious resolution of takeover disputes; formal rules of procedure of the ordinary civil courts are not conducive to expeditious resolution of takeover disputes.

## **5.6 Judicial Review of Specialist Body's Decisions**

The recommended specialist body would be a statutory body performing a public function therefore its decisions would constitute 'administrative action' and thus be subject to judicial review under the Promotion of Administrative Justice Act No.3 of 2000.<sup>211</sup> Judicial review of decisions of the current Panel provides scope for tactical litigation. To avoid this problem it is recommended that the structure of the specialist body should include an internal review panel. A review panel would help to assure the integrity of the specialist body's processes and this is also likely to make the courts less inclined to interfere with the decisions of the specialist body. It is further recommended that the *Datafin* principle with respect to judicial review of decisions of the London Panel be adopted. The principle basically entails allowing contemporary decisions of the London Panel to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error.<sup>212</sup> Adoption of such an approach takes away the incentive for instituting tactical litigation for there will be nothing to be gained by bringing an application for

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<sup>211</sup> ss 1(i) (a) (ii), 6 (1) and (2) of the Promotion of Administrative Justice Act No. 3 of 2000

<sup>212</sup> *R v Panel on Takeovers and Mergers, Ex Parte Datafin plc* [1987] Q.B. 815, 842

judicial review if the courts will only intervene retrospectively by way of declaratory orders.

## **5.7 Conclusion**

In this paper a comparative analysis of the funding structure, enforcement powers and procedures of the Panel and similar regulatory bodies such as the UK's London Panel, the Takeovers Panel in New Zealand and to some extent the Takeovers Panel in Australia was undertaken with the objective of identifying factors that affect the Panel's ability to enforce the Code. The comparative analysis showed that the Panel's ability to enforce the Code is adversely affected by inadequate financing. It was shown that in comparison to the funding structures of UK's London Panel and the New Zealand Takeovers Panel, the Panel's funding structure provided fewer and contracting sources of revenues.

Other factors identified include the lack of an express provision in the Companies Act empowering the Panel to make binding rulings and decisions on the provisions of the Code as well as the Panel's lack of power to procure criminal sanctions or fines against parties who do not comply with its rulings or the Code. It was found that in contrast to the Panel, the effectiveness of the London Panel and the New Zealand Takeovers Panel in enforcing their respective takeover codes is enhanced by express statutory statements of their powers to make binding rulings and decisions on the provisions of their respective codes. It was further shown that, unlike in the case of the Panel, the rulings of these bodies are not only binding, they are also backed by the power to impose fines and to procure criminal sanctions against non-compliant parties. Enforcement support from other regulatory agencies was found to be lacking on the part of the Panel. In comparison support from other regulatory bodies was found to be crucial for the London Panel's effectiveness in enforcing the London Code.

The role of the courts in resolving takeover disputes was shown to be problematic for all the takeover bodies considered. However, it was established that, unlike the courts in South Africa, the courts in the UK have tried not to undermine the effectiveness of the London Panel by restricting themselves to reviewing the London

Panel's decisions only after the takeover bid process is concluded. The Australian approach of limiting the courts' jurisdiction in takeover matters and making the Takeovers Panel the primary forum for resolving takeover disputes was considered; it was recommended as the basis for establishing a specialist body in South Africa with exclusive jurisdiction to resolve takeover disputes during the course of takeover bids. The Constitution and the Promotion of Administrative Justice Act No.3 of 2000 were also identified as placing limitations on the Panel's ability to enforce the Code to the extent that compliance with these causes delays in the rendering of decisions by the Panel.

Finally, recommendations were made on how to improve the Panel's ability to enforce the Code. In so doing, note was taken of the changes proposed under the Companies Amendment Bill 2007 whose provisions were found to address some of the problems highlighted above although inadequately. The proposal to finance the Panel from the public budget will enhance the Panel's finances but the existing funding structure could, if modified by expanding the sources of revenue under it, limit the burden on the public budget. The Panel's effectiveness in enforcing the Code could be enhanced by making express provision in the Companies Act of the Panel's power to make rulings on the provisions of the Code and making it clear that such rulings are binding. Such powers are to be backed by a power to procure criminal sanctions and fines against non compliant parties. Establishing a specialist body with exclusive jurisdiction to resolve takeover disputes would also help to minimize the risk of tactical litigation.

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